Jurisdictional Statement

81-1426

No.

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IN THE

Supreme Court of the United States

October Term, 1981

FREDERICK E. BUCHEIT,

Appellant

v.

REXFORD LAUDENBERGER,

Appellee

and

PORT AUTHORITY OF ALLEGHENY COUNTY and ARTHUR R. CARTER,

Appellee

On Appeal From the Supreme Court of Commonwealth of Pennsylvania

JURISDICTIONAL STATEMENT STATE CIVIL CASE

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QUESTIONS PRESENTED

Whether Rule 238 of the Pennsylvania Rules of Civil Procedure as applied to defendant appellant in the particular circumstances of this case is invalid by reason of repugnancy to the Equal Protection Clause of the United States Constitution in that the Rule discriminated between the appellant and plaintiff appellee, without relation to its purpose of preventing delay, by imposing damages for delay upon appellant as an unsuccessful defendant who had failed to make a settlement offer before trial which constituted at least eighty percent (80%) of the verdict but made no allowance for imposing damages for delay upon appellee irrespective of whether appellee or appellant caused delay, if any.

Whether Rule 238 of the Pennsylvania Rules of Civil Procedure as applied to the appellant in the particular circumstances of this case is invalid by reason of repugnancy to the Due Process Clause of the Fourteenth Amendment of the United States Constitution in that the purpose of the Rule, that of avoiding delay, was not promoted since the trial Judge had no discretion to determine which defendants had caused delay, if any; rather, damages for delay were assessed against both defendants in an arbitrary manner because each had failed to make a settlement offer which constituted at least 80% of the verdict rendered against them.

Whether Rule 238 of the Pennsylvania Rules of Civil Procedure as applied to the appellant in the particular circumstances of this case is invalid by reason of repugnancy to the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution in that the Rule impinged upon appellant's fundamental right to be heard without furthering any compelling state interest.

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The opinion of the trial court is reported at 128 Pittsburgh Legal Journal 319 (1980) and has been made part of the Appendix, attached hereto. The opinion of the Pennsylvania Supreme Court is reported at 436 A. 2d 147 and has been made a part of the Appendix, attached hereto.

JURISDICTION

The decision of the trial court, holding Rule 238 unconstitutional on Equal Protection and Due Process grounds, was entered on July 30, 1980 in the Court of Common Pleas of Allegheny County.

The federal constitutional questions were timely raised when the plaintiff appellee moved to have the verdict molded to include damages for delay pursuant to Rule 238. At that point, defendants urged that Rule 238 as applied to them violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. When the trial court's decision was appealed to the Supreme Court of Pennsylvania, appellant again urged that Rule 238 as applied to him violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The judgment of the Supreme Court of Pennsylvania, reversing the trial court's decision that Rule 238 was unconstitutional, was entered on October 29, 1981.

This appeal is being docketed in this Court within ninety (90) days from the entry of that judgment.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2), which permits an appeal to this Court where the highest court of a state has denied a federal constitutional challenge to a state "statute." It is clear that the term "statute" as it is used in 28 U. S. C. § 1257(2)

includes any enactment having the force of state law, and encompasses a rule of court. *John P. King Mfg. Co. v. City Council of Augusta,* 277 U. S. 100 (1928). Decisions which sustain the jurisdiction of this Court, then, to review the judgment on appeal in this case are: *Stanton v. Stanton,* 421 U. S. 7 (1975); *Duren v. Missouri,* 439 U. S. 357 (1979); *Orr v. Orr,* 440 U. S. 268 (1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 238 of the Pennsylvania Rules of Civil Procedure is set out in full in the Appendix, attached hereto. In relevant part, the statute provides:

> RULE 238. AWARD OF DAMAGES FOR DELAY IN AN ACTION FOR BODILY INJURY, DEATH OR PROPERTY DAMAGE
>
> (a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators appointed under the Arbitration Act of June 16, 1836, P. L. 715, as amended, 5 P. S. § 30 et seq., or the Health Care Services Malpractice Act of October 15, 1975, P. L. 390, 40 P. S. § 1301.101 et seq., shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded which shall become part of the award, verdict or decision.

(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision.

(b) In arbitration under the Act of 1836, the amount of damages for delay shall not be included in determining whether the amount in controversy is within the jurisdiction of the arbitrators.

(c) Except as provided in subdivision (e), damages for delay shall be added to the award, verdict or decision against all defendants found liable, no matter when joined in the action.

(d) The court may, and on request of a party shall, charge the jury that if it finds for the plaintiff, it shall not award the plaintiff any damages for delay because this is a matter for the court.

(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made.

STATEMENT OF THE CASE

The objective of Rule 238 is to penalize defendants who choose to try their cases rather than make settlement offers within certain guidelines. The Opinion of the Pennsylvania Supreme Court herein, finding the Rule constitutional, *rests fundamentally on the proposition that defendants are "tortfeasors."* Appendix at A17. Defendants are *not* tortfeasors at the point in time when Rule 238 has its intended effect upon them—*i.e.*, before any trial. Rule 238 penalizes defendants (but not plaintiffs) for going to trial. The Rule is unconstitutional.

The present case arises out of a collision that occurred on January 30, 1978, between a bus owned by the original defendant, Port Authority of Allegheny County, and operated by its employee, Arthur R. Carter, and an automobile operated by defendant appellant, Frederick C. Bucheit. The plaintiff-appellee, Rexford Laudenberger (hereinafter "appellee"), was a passenger in the bus and was standing at the front of the bus preparing to disembark when the collision occurred. He suffered lacerations in his right hand in addition to bruises in his legs. After trial, the jury returned a verdict in favor of the appellee in the amount of Eighty Five Thousand Dollars ($85,000.00) and determined that the Port Authority of Allegheny County was sixty per cent (60%) negligent and the appellant was forty per cent (40%) negligent. Subsequently, the appellee filed a Motion to Mold the Verdict with the trial court to have damages for delay added to the verdict in accordance with Pennsylvania Rule of Civil Procedure 238 which imposes damages for delay upon tortfeasor defendants where, *inter alia*, the tortfeasor defendant failed to make a settlement offer before trial which constituted at least eighty percent (80%) of the verdict entered in plaintiff's favor. The Motion was granted.

Appellant then filed a Motion to Remold the Verdict, which was argued in their brief in support of a Motion for a New Trial. It was there that the appellant first argued that Pennsylvania Rule of Civil Procedure 238 was unconstitutional because it violated the Due Process and Equal Protection Clauses of the United States Constitution.

A three judge panel in the Common Pleas Court of Allegheny County, Pennsylvania, which ruled on the post-trial motions, held that Rule 238 was invalid by reason of repugnancy to the Equal Protection Clause and the Due Process Clause of the United States Constitution. The Supreme Court of Pennsylvania reversed the trial court and instructed that damages for delay under Rule 238 of the Pennsylvania Rules of Civil Procedure be awarded the appellee. Justice Roberts dissented, stating that the Rule was unconstitutional in that "[it imposed] duties and sanctions only upon defendants, but not upon plaintiffs." Appendix at A29.

Appellant herein appeals from the decision holding Rule 238 constitutional.

THE FEDERAL QUESTION IS SUBSTANTIAL

I. Rule 238 as Applied in the Decision Below Violates the Appellant's Equal Protection Rights.

To pass muster under the Equal Protection Clause, this Court has held that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U. S. 71, 76 (1976), quoting *Royston Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920). As the trial court below pointed out, the classification created by Rule 238, which resulted in unequal treatment of appellee and appellant, fails to meet this standard for two reasons: first, as litigants, appellee and appellant were similarly situated yet disparately treated because the Rule failed to allow for the imposition of a penalty for delay upon the appellee even had appellee delayed the action; second, the Rule did not bear a rational relation to its stated purpose of preventing delay, because the absence of discretion in the trial court eliminated that court's only opportunity to determine whether delay had occurred and who was responsible for it.

In reversing the trial court's ruling that Rule 238 was violative of the Equal Protection Clause, the Pennsylvania Supreme Court first found that the Rule's differential treatment of appellee and appellant in the instant case was justified because those parties were not similarly situated. Instead, reasoned that Court, appellee was a wrongfully injured party unfairly deprived of compensation during pretrial delays while appellant was a tortfeasor who had suffered no wrong.

This argument is unresponsive to the trial court's cogent reasoning. It attempts to justify the different treat-

ment of appellee and appellant by focusing on the possibility that appellant may prove to be a tortfeasor. The language of Rule 238, however, unequivocally states that the sanction imposed by the Rule is for pretrial delay ("damages for delay"). Thus, it is no justification that the party against whom a penalty for delay is assessed is a tortfeasor; the only justification for assessing the penalty under the Rule is that the penalized party have caused delay. As applied in the instant case, though, Rule 238 classified the parties for the purpose of assessing damages for delay only by whether the party was an underlying plaintiff or defendant. The actual responsibility of either or both parties for causing delay, if any, was not a criterion. Thus, appellant here was placed in a different class than appellee and treated differently under the Rule —yet was similarly situated in that he, like the appellee, had not specifically been adjudged to have caused any delay.

In addition, the Pennsylvania Supreme Court's argument is logically flawed. It rests on the proposition that, at the time Rule 238 first affected the parties, *i.e.* before trial, the appellant, as a defendant, was not unjustly treated because he was a "*tortfeasor.*" Appendix at A17. Appellant, however, was *not a "tortfeasor"* before trial. The question of liability was unanswered and appellant had not yet been accorded his right to have liability and damages determined at trial. Thus, at the time in the litigation process when Rule 238 first impacted on appellant, appellee and appellant were not in different classes but in one identifiable class: prospective litigants awaiting a determination as to liability.

The Pennsylvania Supreme Court's response to the trial court's second ground for finding Rule 238 violative of the Equal Protection Clause is even less defensible. That court apparently reasoned that the Rule is rationally

related to its stated purpose in that it may encourage defendants to settle meritorious claims, thereby curbing delay. The fact that the effective prevention of pretrial delay will only occur where the party causing the delay is penalized—rather than only the unsuccessful defendant—is not at all acknowledged by the Pennsylvania Supreme Court. Thus, that Court's response to the trial court's second argument is a bald declaration that Rule 238 has a rational relation to its purpose. No explanation is offered for how the mandatory assessment of damages for delay could be rationally related to curbing pretrial delay where the trial court is not permitted to levy delay damages on dilatory plaintiffs or non-liable defendants.

Rule 238 also violates the Equal Protection Clause because it impinges upon a defendant's fundamental right to be heard by penalizing him for bringing a plaintiff's claim to trial. *Schroeder v. City of New York*, 371 U. S. 208, 212 (1962). By limiting the exercise of this fundamental right in a discriminatory manner, Rule 238 operates unconstitutionally unless "it is supported by sufficiently important state interests and clearly tailored to effectuate those interests." *Zablocki v. Redhail*, 434 U. S. 374, 388 (1978). More specifically, to justify the application of the Rule here, appellee must establish the existence of a compelling state interest. See *Roe v. Wade*, 410 U. S. 113, 155 (1973); *San Antonio School District v. Rodriguez*, 411 U. S. 1, 16-17 (1973). As outlined above, appellee has failed to demonstrate that Rule 238 satisfies the rational basis test; *a fortiori*, Rule 238 fails to meet the more stringent compelling state interest test. Thus, Rule 238 violated appellant's right to the free and unfettered exercise of his federal constitutional right to be heard.

Finally, the general constitutional infirmity of Rule 238 is reflected in the fact that it is both underinclusive

and overinclusive in its attempt to encourage early settlements of state court cases. It is underinclusive in that it fails to punish all parties who might be responsible for the delay for which it awards damages, while it is overinclusive in that it mandates the recovery of "damages for delay" from defendants who in fact might not be responsible for that delay as well as from defendants who might bear that responsibility. Because of its underinclusive and overinclusive nature, Rule 238 violates the equal protection clause of the Fourteenth Amendment. See *McDaniel v. Paty*, 435 U. S. 618, 645 (1978) (White, J., concurring opinion); *Zablocki v. Redhail*, 434 U. S. 374, 390 (1978); *Matter of Estate of Cavill*, 459 Pa. 411, 416-17 (1974).

II. Rule 238 As Applied in the Decision Below Violates Appellant's Due Process Rights.

As the trial court held, Rule 238 is unconstitutional not only because it discriminates unfairly between plaintiffs and defendants, but also because it does not discriminate fairly enough between groups of defendants. In the instant case, there were two defendants adjudged to be liable to the plaintiff. Appellant was held to be forty per cent (40%) liable while the other defendant was found to be sixty per cent (60%) liable. Subsequently, the Pennsylvania Supreme Court instructed that damages for delay be assessed against appellant in proportion to his adjudged degree of liability—not in proportion to the percentage of delay he caused, if any. This imposition of a penalty upon appellant is clearly arbitrary and capricious since it did not permit the trial judge to assess delay damages only against those defendants who caused delay, if any.

Therefore, Rule 238 as applied to appellant violates due process in the substantive sense. The Rule's objective of discouraging delay was not reasonably advanced

here, since the trial judge was not allowed the discretion to determine the extent to which each defendant caused delay, if any.

Moreover, the Rule's failure to leave the trial judge discretion to apportion damages for delay to the parties responsible, violated the Due Process Clause by penalizing the defendant's exercise of his fundamental right to be heard. In *Boddie v. Connecticut*, 401 U. S. 371 (1971), the United States Supreme Court established that defendants have the right under the due process clause of the Fourteenth Amendment to be heard in their own defense. Justice Harlan, speaking for the Court, stated that:

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend.' . . . The theme that 'due process of law signifies a right to be heard in one's defence,' . . . has continually recurred in the years since *Baldwin, Windsor and Hovey.*" 401 U. S. at 377-378 (citations and footnote omitted).

See also, *Bell v. Burson*, 402 U. S. 535, 541-542 (1971); *Wisconsin v. Constantineau*, 400 U. S. 433, 447 (1971). Earlier, the Supreme Court described the right to be heard as "one of the most fundamental requisites of due process." *Schroeder v. City of New York*, 371 U. S. 208, 212 (1962).

The Court in *Boddie* recognized that the right to be heard must be accorded to parties who are involuntarily drawn into judicial disputes because access to the judicial process provides "not only the paramount dispute-settle-

ment technique, but, in fact, the only available one." 401 U. S. at 377. Because "the right to due process reflects a fundamental value of our American constitutional system," 401 U. S. at 374, and because defendants are subject to deprivation of property in judicial proceedings, the Court, in words particularly relevant to this proceeding, stated that:

> "[T]he successful invocation of this governmental power [to resolve disputes] by plaintiffs has often created serious problems for defendants' rights. For at this point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." 401 U. S. at 376 (emphasis added).

See also, *Fuentes v. Shevin*, 407 U. S. 67, 80-82 (1973). Rule 238, by penalizing appellant's right to be heard in the instant case, has violated his rights under the Due Process Clause.

Furthermore, it seems clear under *Boddie* that the defendant's fundamental right to be heard may not be compromised merely to encourage early settlements of suits:

> "[P]rivate structuring [outside of court] of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount." 401 U. S. at 375 (emphasis added).

See generally, *Vlandis v. Kline*, 412 U. S. 441, 451 (1973); *Stanley v. Illinois*, 405 U. S. 645, 656 (1972); *Heiner v. Donnan*, 285 U. S. 312, 325, 328 (1932).

Based on this rationale, the Court in *Boddie* rejected the state's argument that certain fees, averaging $60.00

per case, could be imposed in the interests of judicial administration:

> "The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational, and its balance between the defendant's right to notice and the plaintiff's right to access is reasonable.
>
> In our opinion, none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages." 401 U. S. at 381.

This rationale applies with equal force to the case at bar. The state's purported interest in settling suits cannot override the appellant's interest in having "full access" to judicial proceedings, representing the "only forum effectively empowered to settle" appellant's disputes. *Id.* at 376.

Rule 238 violates the Due Process Clause of the Fourteenth Amendment for the further reason that it deprives appellant herein "of . . . property without due process of law" by mandating the assessment of 10% of appellee's verdict against appellant as "damages for delay" without providing any forum in which the appellant can contest the basis for the imposition of such damages. Clearly, appellant's property, in this case money, cannot be taken constitutionally without appellant receiving some sort of hearing consistent with the due process requirements of the Fourteenth Amendment in which appellant can contest the imposition of "damages for delay." See, *Fuentes v. Shevin*, 407 U. S. 67, 80-84 (1972); *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 339-342 (1969).

See generally, *Vlandis v. Kline*, 412 U. S. 441 (1973); *Heiner v. Donnan*, 285 U. S. 312, 322-329 (1932).

The fact that Rule 238 denies appellant his due process right to "a prior hearing of some kind" (*Fuentes v. Shevin, supra*, 407 U. S. at 84) before depriving him of his property is made evident by the fact that the Rule creates an impermissible, conclusive presumption that appellant, by not making a settlement offer at least equal to 80% of the verdict, acted not in good faith, but rather to delay trial. This irrebuttable presumption contravenes the Due Process Clause in that it precludes appellant from contesting his responsibility for the purported delay for which Rule 238 awards damages. As the Supreme Court held in *Heiner v. Donnan*, 285 U. S. 312 (1932),

> "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the Due Process Clause of the Fourteenth Amendment." 285 U. S. at 329.

See also, *Vlandis v. Kline, supra*, 412 U. S. at 441, 452 (1973).

III. The Authorities Sanctioning Prejudgment Interest Are Inapposite.

Crucial distinctions exist between the types of "prejudgment interest" rules and statutes which have been deemed constitutional, and Rule 238 which mandates damages for delay. These distinctions are controlling from a constitutional standpoint in that, while the application of prejudgment interest may in some instances be constitutional, the imposition of "damages" for "delay" against *only defendants* contravenes the rights guaranteed defendants by the Fourteenth Amendment.

The distinctions are manifested in a comparison of Rule 238 and its purpose with the New Jersey rule discussed and sanctioned in *Busik v. Levine*, 63 N. J. 351, *appeal dismissed for want of a substantial federal question*, 414 U. S. 1106 (1973).[1] The most significant difference between the rule addressed in *Busik* and Rule 238 lies in the primary purpose behind the enactment of those respective rules. A reading of the decision in *Busik* makes clear that, although by enacting a rule providing for prejudgment interest the New Jersey court as a secondary matter hoped to "induce prompt defense consideration of settlement possibilities," 63 N. J. 359, the primary purpose of the rule was to compensate successful plaintiffs for the loss of use, during the pendency of a lawsuit, of the monetary damages ultimately awarded. Thus, in upholding the New Jersey prejudgment interest rule, that Court held:

> "Interest is not punitive [citation omitted]; here it is compensatory, to indemnify the claimant for the loss of what the monies due him would presumably have earned if payment had not been delayed." 63 N. J. at 358 (emphasis added).

See also, *Kotzian v. Barr*, 152 N. J. Super. 561 (App. Div. 1977).

In contrast, the purpose of Rule 238 is not to compensate successful plaintiffs, as was the case in *Busik*. Both Rule 238 itself and the Explanatory Comment to the Rule (attached as part of the Appendix) show that the Rule was intended to provide an "incentive" for a defendant, and only a defendant, to settle early by inflicting a penalty on a defendant wishing to assert his constitutional right to be heard.

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1. The prejudgment interest rule passed on in *Busik* is set forth in full in the Appendix, attached hereto.

The constitutionally crucial distinction between the punitive nature of Rule 238 and the compensatory nature of the rule tested in *Busik* is reflected in other distinctions between the two rules. For example, the rule applied in *Busik* specifically provided for the imposition of "prejudgment interest." The Court enacted a rule providing for prejudgment and post-judgment interest of only 6%,[2] the legal rate, despite the fact that, at the time the rule was enacted, the usury ceiling in New Jersey stood at 8% See *Busik v. Levine, supra,* 63 N. J. at 357. On the other hand, Rule 238 imposes a 10% rate on defendants seeking to exercise their constitutional right to be heard. That this rate is intended as a penalty is reflected in the fact that the 10% surcharge is significantly above the 6% rate of interest on verdicts and judgments in Pennsylvania. 12 P. S. § 781.

Another pertinent distinction is the existence of the "exoneration" clause in Rule 238, which does not appear in the *Busik* rule. While parties recovering only one hundred and twenty-five percent (125%) or less of a settlement offer are as entitled to compensation for loss of monies eventually awarded them as are other parties, Rule 238 excludes payment of damages for delay to those parties, contrary to the across-the-board entitlement of plaintiffs to prejudgment interest under the rule addressed in *Busik.*

The compensatory nature of the New Jersey prejudgment interest rule also is reflected in that rule's specific provision that:

> "The contingent fee of an attorney shall not be computed on the interest so included in the judgment."

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2. Effective September 14, 1981, the rate for prejudgment interest in New Jersey became 12% per annum. R. 4:42-11. To the best of counsel's knowledge, the constitutional validity of this rate has not yet been determined by the New Jersey courts.

This provision demonstrates that the New Jersey rule was intended to implement the determination that it was necessary to compensate a successful plaintiff "for the loss of what monies due him would presumably have earned if payment had not been delayed." No similar limitation exists in Rule 238, again showing that the Rule was designed to penalize state court defendants rather than to compensate plaintiffs for the value of monies lost while litigation was pending.

Finally, Rule 238's penal purpose is evidenced in the fact that, in determining that it should impose a ten percent (10%) per annum penalty, the Pennsylvania Supreme Court in the Explanatory Comment to the Rule reasoned that this percentage was necessary because it was greater than that amount which a state court defendant could earn on retained funds by investing those funds "with reasonable safety," thereby providing a "financial incentive to the defendant to settle early." Thus, Rule 238 is clearly distinguishable from a prejudgment interest rule in which compensation to plaintiffs, rather than penalties to defendants, provides the rationale for the rule.

In summary, Rule 238 was not intended to and did not provide for prejudgment interest as compensation for the appellee, rather, that Rule was intended to and did penalize appellant herein for exercising his constitutional right to be heard as a defendant.

IV. Conclusion

The decision below finding Rule 238 constitutional as applied to appellant should be summarily reversed. The Rule clearly violated the federal constitutional rights accorded appellant under the Fourteenth Amendment of the United States Constitution. Alternatively, this appeal should be granted plenary review because the federal questions posed by the appeal are substantial.

Respectfully submitted,

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Appendix

Appendix

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 80-1-160

REXFORD LAUDENBERGER,
Appellant

v.

PORT AUTHORITY OF ALLEGHENY COUNTY, and ARTHUR R. CARTER,
and
FREDERICK E. BUCHEIT

Appeal from the Judgment entered 7/30/80 in the Court of Common Pleas, Civil Division, of Allegheny County, at No. G.D. 78-5062.
ARGUED: March 2, 1981

O'BRIEN, *C.J.* FILED: OCTOBER 29, 1981

Today we are called upon to determine the constitutionality of Pa.R.C.P. 238, promulgated by this Court pursuant to our constitutional rule-making authority. Rule 238 pertains to prejudgment interest granted in certain instances to plaintiffs who receive jury verdicts in excess of any settlement offer made by a defendant prior to trial. The trial court in the instant case held this rule to be un-

constitutional and refused to remold the verdict in accordance with Rule 238.

This rule is attacked from several directions. The authority of the Supreme Court to formulate such a device as this is initially questioned. The rule is also subjected to allegations that it violates the standards of due process and equal protection as guaranteed by both the Pennsylvania and the United States Constitutions. We find that Rule 238 withstands all objections, and reverse the order of the trial court.

I.

The Supreme Court of Pennsylvania is empowered to:

> "prescribe general rules governing practice, procedure, and the conduct of all courts. . . if such rules are consistent with this Constitution and neither abridge, enlarge, nor modify the substantive rights of any litigant. . ."

Pa. CONST. art. V, § 10(c). Pursuant to this power, this Court promulgated Pa.R.C.P. 238 on November 20, 1978, effective April 15, 1979.[1] Rule 238 states in part:

> "(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the Court. . . shall
>
> > "(1) Add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict, or decision;
>
> • • •

1. A dissent was filed by Justice Roberts. *See* 480 Pa. XLI (1978).

> "(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until the commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the Court or the arbitrators shall not award damages for delay for the period after the date the offer was made. . ."

The trial court declared this rule to be unconstitutional, contending that it involves a substantive right and is therefore beyond the procedural rule-making authority of the Supreme Court. In order to determine if this Court did indeed over-extend its authority, we must review the above rule and decide whether it "abridges, enlarges, or modifies" any substantive rights or if the rule governs elements of practice and procedure in tort cases.

The attempt to devise a universal principle for determining whether a rule is inherently procedural or substantive in nature has met with little success in the history of our jurisprudence. In addressing this issue, the Supreme Court of the United States attempted to define procedural law as:

> "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."

Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S.Ct. 422, 85 L.Ed. 479 (1941). Unfortunately, this analytic determination would only be useful if "substance" and "procedure" were two "mutually exclusive categories with easily ascertainable contents." *Sibbach v. Wilson & Co.*, *supra* at 17, 61 S.Ct. at —, (dissenting opinion by Frank-

furter, J., in which Black, Douglas and Murphy, JJ., concurred.) [2] Rather, "[t]he demarcation between procedure and substantive rights frequently is shadowy and difficult to determine." [3] Procedural law is undeniably an integral thread in the fabric of the law. As threads are woven into cloth, so does procedural law interplay with substantive law. Together, they create a cohesive whole. However, it is this very proximity which often leads to difficulty in identifying one thread as procedural and another as substantive. As Justice Rutledge once observed:

> "[I]n many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible. But, even so, this fact cannot dispense with the necessity of making a distinction."

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 559, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), (Rutledge, J., dissenting.) Such is the position in which we currently find ourselves. In seeking to unravel this Gordian knot, we must not be swayed by simplistic solutions. One noted legal scholar cautioned:

> "The tacit assumption that the precise point at which the line between the two is to be drawn is the same for all purposes. . . is of course connected with the other assumptions. . . namely, that the 'line' is to be 'discovered' rather than 'drawn' and that it can be located without keeping in mind the purpose of the classification. If once we recognize that the 'line' can

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2. *See, Boggs v. Blue Diamond Coal Co.*, 497 F.Supp. 1105, 1121 n. 82 (E.D. Ky. 1980) where the court stated, "the *Sibbach* test, as worded, leaves a number of gray areas, because it is circular, defining procedure as a means of protecting substantive rights, without providing a test for the latter."

3. 3 *Cyclopedia of Federal Procedure* § 8.12 (1967).

> be drawn only in the light of the purpose in view, it cannot be assumed without discussion that as our purposes change the line can be drawn at precisely the same point."

W. Cook, *Logical and Legal Bases of the Conflict of Law* 158-159 (1942). We must therefore seek to determine the purpose of the rule in order to properly characterize its nature.

In September, 1978, the Civil Procedural Rules Committee proposed Rule 238 to this Court for its review and promulgation. In the accompanying explanatory comments, the Committee stated:

> "The judicial system has long been vexed by the problem of congestion and delay in the disposition of civil actions for bodily injury, death or property damages pending in the trial courts. Various techniques, such as compulsory arbitration, have helped to dispose promptly of the bulk of such cases in amounts under $10,000 in Philadelphia and Allegheny Counties and under $5,000 in other counties which have adopted compulsory arbitration. Nevertheless, there is still a considerable residue of so-called major cases not presently subject to arbitration. There are also the appeals from arbitration which require further proceedings in the trial court.
>
> "Statistics show that. . . [t]hirty-eight percent are settled without going to trial. Some are settled through pretrial conciliation techniques, but in too many cases meaningful negotiations commence only after a trial date is fixed or on the courthouse steps or in the courtroom, thus leading to delay in the disposition of cases and congestion in the courts. The present practice provides no incentive for early settlement.

> "In the usual civil action for bodily injury, death or property damage there is no compensation to the successful plaintiff and no sanction against the defendant for the long delay between commencement of the action and the trial."

8 *Pa. Bulletin* 2668 (1978). These explanatory notes have not been officially adopted or promulgated by this Court, nor do they constitute part of the rule. However, they indicate the spirit and motivation behind the drafting of the rule, and they serve as guidelines for understanding the purpose for which the rule was drafted.

Rule 238 awards damages for delay only in cases where the defendant made no settlement offer prior to trial or where the defendant made an offer of settlement which was 25% less than the amount of the jury verdict. Such language clearly reflects a primary desire to encourage pre-trial settlement. In those instances where the settlement offer is not accepted and the jury verdict does not exceed the offer by 25%, the interest is only computed up to the date of the settlement offer. By tolling the running of interest, this provision demonstrates the prominent goal of fostering *early* settlements. Undeniably, this rule serves to compensate the plaintiff for the inability to utilize funds rightfully due him, but the basic aim of the rule is to alleviate delay in the disposition of cases, thereby lessening congestion in the courts.

This objective is even more visible when compared with pre-judgment interest rules in other states. New Jersey's Rule 4:42-11, which also has been subjected to procedural-substantive scrutiny,[4] uniformly provides interest at 6% per annum on the amount of the jury verdict or award from the date the lawsuit is filed or six months

4. *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973), *appeal dismissed*, 414 U.S. 1106, 94 S.Ct. 831, 38 L.Ed.2d 733 (1973).

after the tort, whichever is later. Successful plaintiffs are compensated for delay whether they receive and reject any reasonable settlement offers or not. There is no impetus to the plaintiff to accept an early yet reasonable settlement offer, since the interest continues to run after the offer is made.

The restrictions placed on the Pennsylvania rule encourage early disposition of tort litigation in a way that New Jersey's rule does not. In Pennsylvania, defendants may protect themselves from exposure to pre-judgment interest by making a reasonable written settlement offer in a timely fashion. Should the plaintiff reject it and not recover an award 25% greater than the offer, the defendant is assessed interest only from the date on which the complaint is filed or one year from the accrual of the action, whichever is later, up to the date of the settlement offer. Thus, the format of Rule 238 is responsive to its fundamental goal of prompting meaningful negotiations in major cases so as to unclutter the courts.

The promulgation by this Court of a pre-judgment interest rule is founded upon both constitutional authority and an absolute duty to the public. In 1968, the Judiciary Article of the Pennsylvania Constitution was altered to grant the Supreme Court "the power to prescribe general rules governing practice, procedure, and the conduct of all courts." Art. V, § 10(c).[5] Further, this provision declared that "[a]ll laws shall be suspended to the extent that they are inconsistent with the rules prescribed under [this] provision."

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5. Prior to 1968, the General Assembly had explicitly granted restricted rule-making authority to the Supreme Court. This grant was originally made in the Act of June 21, 1937, P.L. 1982, No. 392, and was amended by the Act of March 30, 1939, P.L. 14, and the Act of August 25, 1959, P.L. 751. Codified as 17 P.S. § 61, it was repealed by the Judiciary Act Repealer Act, Section 2, No. 1978-53.

We have held in the past that this constitutional grant of authority is complete. "[T]he power to make rules is that of the judiciary and the judiciary alone." *In Re 42 Pa.C.S. § 1703*, 482 Pa. 522, 394 A.2d 444, 450 (1978). We found in *In Re 42 Pa.C.S. § 1703, supra*, that a statute making the Public Agency Open Meeting Law applicable to the Supreme Court while exercising its rule-making authority was unconstitutional as a violation of the separation of powers doctrine. In a letter addressed to the Governor, we observed that:

> " 'the Pennsylvania Constitution gives the state's Supreme Court exclusive power to establish rules of procedure for state Courts' and that 'the legislature is *without power to control procedure.*' "

In Re 42 Pa.C.S. § 1703, supra at 529, 394 A.2d at 448, quoting *Garrett v. Bamford*, 582 F.2d 810, 814 (3d Cir. 1978). The sole responsibility for the administration of the judicial system and all the procedural problems inherent therein devolves upon this Court. Consequently, it is not the legislators who are held accountable by the public for the efficient and orderly administration of the courts, but the judiciary itself.[6]

The Civil Procedural Rules Committee conducted a study of major cases in the Pennsylvania judicial system which were not subject to arbitration. Statistics revealed that only 38% go to trial; only 25% culminate in a verdict. Most cases which do settle prior to trial only do so very close to the scheduled trial date.[7] The delay in disposition of cases emasculates the judicial system's ability to hear those cases which must be litigated. Rule 238 fulfills

6. Lewis and Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. of Pa. L.Rev. 10 (1958).

7. Explanatory Comments, 8 *Pa. Bulletin* 2668 (1978).

this Court's obligation to the legislature and to the public to effectuate prompt, expeditious trial and settlement of cases.

The trial court opinion ignores the procedural basis for Rule 238 and contends that this pre-judgment interest rule is substantive in nature. In support of its position, it relies upon federal diversity and conflicts of law cases, where interest as an element of damages has been characterized as substantive law, as well as the fact that other states with similarly provided pre-judgment interest have had such rules adopted for the most part by the legislatures.

Appellees, apparently unaware of the Supreme Court's belief that "the line between 'substance' and 'procedure' shifts as the legal context changes," *Hanna v. Plumer,* 380 U.S. 460, 471, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), also refer us to federal diversity cases which have recognized the substantive nature of pre-judgment interest rules.

According to the mandate of *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal courts must apply the forum state's substantive laws, while the federal rules govern the procedural aspects of the case. 3 *Cyclopedia of Federal Procedure, supra* note 3, at § 8.14. Numerous federal courts have ruled that, under the *Erie* doctrine, state pre-judgment interest rules concern substantive rights of the parties and are therefore applicable to diversity cases. *See Plantation Key Developers, Inc. v. Colonial Mortgage Co.,* 589 F.2d 164 (5th Cir. 1979); *Clissold v. St. Louis-S.F.Ry.,* 600 F.2d 35 (6th Cir. 1979); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979,* 480 F. Supp. 1280 (N.D.Ill. 1979), aff'd., 644 F.2d 633 (7th Cir. 1981), *Glick v. White Motor Co.,* 458 F.2d 1287 (3d Cir. 1972).

Recently, the Third Circuit has considered the applicability of our Rule 238 to diversity cases. In *Bullins v. City of Philadelphia,* 516 F.Supp. 728 (E.D.Pa. 1981),

Chief Judge Lord amended the plaintiff's judgment to add pre-judgment interest pursuant to Rule 238. In doing so, Chief Judge Lord determined the rule was substantive in nature. While he recognized the Court's rationale in promulgating the rule, he found that application of this rule in diversity cases was more consistent with the intent of *Erie*:

> "An increased efficiency and expedition in the disposition of lawsuits alone is not really an end in itself. The real substantive consideration is to encourage the prompt award of merited and sometimes economically required compensation by a wrongdoer to a victim. . . The purposes of the Erie doctrine are to end discrimination against citizens by non-citizens and to discourage forum-shopping. Hanna v. Plumer, 380 U.S. 460, 467 (1965). Application of Rule 238 to federal diversity cases will serve both goals."

Bullins v. City of Philadelphia, supra, at 730. However, in so ruling, the district court conceded that its analysis of the nature of Rule 238 for diversity cases is a separate and distinct concern from the question of whether Rule 238 is procedural or substantive for the purposes of determining the Supreme Court's power to promulgate the rule. Judge Lord wrote that the *Erie* determination sought to fulfill the purposes of the *Erie* doctrine: to end discrimination against citizens by non-citizens and to discourage forum-shopping. In that context only did he hold the rule to be substantive. Clearly, such a classification, when drawn for its own particular purpose, cannot be considered final for all other intents. *See Kanouse v. Westwood Obstetrical & Gyn.*, 505 F.Supp. 129, 131 (D.N.J. 1981).

Appellees also call our attention to nine states which have similar pre-trial interest provisions. Of these states, eight provided this relief via statutory enactments promul-

gated by their legislatures.[8] Appellees assert that these statutory enactments denote the substantive nature of the subject.[9] However, in order to attribute significance to this legislative involvement in the area of prejudgment interest, it would be necessary to analyze each state's constitution to determine whether the legislature or the judiciary possessed the procedural rule-making authority. Furthermore, each statute would have to be reviewed to ascertain if the provisions were drafted so as to affect substantive rights or if procedural concerns predominate, as in Rule 238.[10] In the interests of judicial economy, we will instead direct our attention to the only state which also possesses a juridical rule of prejudgment interest.

As stated previously, New Jersey's rule was similarly tested for constitutional infirmities. In *Busik v. Levine, supra* note 4, the New Jersey Supreme Court viewed the rule as an attempt to:

> "induce prompt defense consideration of settlement possibilities. In that meaningful way, prejudgment

8. See Colorado: Col.Rev.Stat.Ann. 1973 § 13-21-101; Louisiana: LSA-RS. 13:4203; Michigan: MCLA § 600.6013; New Hampshire: N.H.R.S.A. § 524:1-6 (Supp.); North Dakota: N.D. § 32-03-05; Oklahoma: 12 Okla. St. Ann. § 727(a); Rhode Island: R.I. Gen. Laws § 9-21-10; South Dakota: S.D.C.L. 1967 Ann. § 21-1-11 for prejudgment interest statutes, and New Jersey Rule of Civil Procedure 4:42-11 for a judge-made rule.

9. It is interesting to note that, of the eight states which have legislative enactments, four categorize these statutes among laws dealing with "Procedure," (Colorado, Louisiana, New Hampshire, and Rhode Island) while two others classify this relief as "Judicial Remedies," (North Dakota and South Dakota).

10. In Louisiana, for example, the state Supreme Court enjoys only supplementary rule-making authority. "[R]ule-making power is entrusted primarily to the legislature, and not to the Courts." Tate, *Rule-Making Powers of Courts in Louisiana.* 24 La.L.Rev. 555, 558 (1963-1964).

> interest bears directly upon the judicial machinery and the problems of judicial management."

Busik v. Levine, supra at 359-360, 307 A.2d at 576. The court therefore opined that the rule was within its procedural rule-making authority. This authority to "make rules governing. . . the practice and procedure" in all courts was granted to the state supreme court by Art. VI, § 2, of the New Jersey Constitution.

Appellees argue that the above ruling is unpersuasive because the New Jersey Supreme Court enjoys a constitutional grant of power which does not place limitations on the court's substantive law-making ability. In Pennsylvania, this Court is limited by the language of the Constitution to promulgating only those rules which do not interfere with the substantive rights of litigants. Although New Jersey's Constitution does not specify as much, that is not to say that the power of the judiciary is without boundaries. The New Jersey Supreme Court noted as much in *Busik v. Levine, supra* at 362, 307 A.2d at 577, when it said:

> "Limitations of course do exist, but they arise, not from the cited section of the Constitution, but from the nature of the judicial process and of the Court's responsibility."

Consequently, there is no substantive distinction between New Jersey and Pennsylvania with respect to the judicial procedural rule-making authority.

Appellees attempt to distinguish *Busik v. Levine, supra* note 4, by stressing that, historically, New Jersey's rules concerning interest upon obligations, claims, and judgments have been judge-made. In Pennsylvania, on the other hand, interest on verdicts and judgments has always been governed by statutes. *See,* for example, 42 Pa.C.S.A. § 8101 (which provides for post-judgment interest). However, the same could be said for statutes con-

cerning the award of counsel fees, as seen in 42 Pa.C.S.A. § 2503(6). Yet this Court has promulgated numerous rules of civil procedure wherein costs have been imposed, including attorney's fees, to compensate for delays. See Pa.R.C.P. 217 and Pa.R.C.P. 4019. Thus, Rule 238 is simply another step in a continuum aimed at furthering litigation in a meaningful way while protecting the rights of the litigants. *Busik v. Levine, supra* note 4, does not stand on different footing; rather, it furnishes persuasive authority for the power of this Court to promulgate a pre-judgment interest rule.

Appellees' fundamental argument is that the rule creates a new duty upon the part of defendants to pay additional damages. They assert the rule enlarges the substantive rights of plaintiffs by compensating them for the loss of the use of money damages during the pendency of the lawsuit, while abridging the rights of the defendants. Consequently, they contend the rule represents a departure from this Court's rule-making authority and must be declared unconstitutional.

The rule undeniably imposes an additional duty upon defendants in the form of pre-judgment interest. But what is the essence of this duty? Rule 238 provides compensation to a plaintiff for delay in receiving the monetary damages owing as a result of a defendant's tort. This serves to indemnify the plaintiff for the money he would have earned on his award if he had promptly received it. Such an idea was often followed in cases concerning liquidated damages [11] and breach of contract cases.[12]

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11. *Girard Trust Corn Exchange Bank v. Brink's, Inc.*, 422 Pa. 48, 220 A.2d 827 (1966), *Carbondale City School District v. Fidelity & Deposit Co. of Md.*, 346 Pa. 491, 31 A.2d 279 (1943).

12. *U.S. v. Bethlehem Steel Corp.*, 113 F.2d 301 (3d Cir. 1940), *aff'd.*, 315 U.S. 289, 62 S.Ct. 581, 86 L.Ed. 855 (1942).

In 1970, we extended that doctrine to permit the plaintiff to recover compensation for delay in payment after loss in tort cases. *See Marrazzo v. Scranton Nehi Bottling Co.*, 438 Pa. 72, 263 A.2d 336 (1970). However, we viewed such compensation as an issue for the finder of fact, after full consideration of all relevant circumstances. In so holding, we stated:

> " 'the plaintiff will not be fully compensated unless he receive, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages, in the nature of interest, for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure.' "

Marrazzo v. Scranton Nehi Bottling Co., supra at 75, 263 A.2d at 337, quoting *Richards v. Citizens Natural Gas Co.*, 130 Pa. 37, 40, 18 A. 600 (1889). Although the award for delay of time may be "in the nature of interest," in reality, it is merely an extension of the compensatory damages necessary to make a plaintiff whole. Damages have been defined as "the sum of money which the law awards or imposes as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence either of a breach of a contractual obligation or a tortious act." 22 Am.Jur.2d, Damages § 1. The law of damages concerns the just administration of remedies for the disregard of rights recognized by substantive law, which is the definition, according to the Supreme Court of the United States, of procedural law. See *Sibbach v. Wilson & Co., supra.*

Nonetheless, one can always argue, and not unconvincingly, that Rule 238 creates a new substantive right to interest in the plaintiff based upon a secondary, derivative

wrong perpetrated by the defendant in delaying settlement.

Undeniably, Rule 238 embodies both procedural and substantive elements. Its purpose and effect are procedural, yet its performance will touch upon substantive rights of both parties. However, the fact that a rule does involve the substantive rights of litigants should not mean that the rule is an inappropriate topic for Supreme Court rule-making. Most rules of procedure will eventually reverberate to the substantive rights and duties of those involved. We therefore must agree with our brethren in New Jersey that:

> "an absolute prohibition against rules which merely affect substantive rights or liabilities, however slight such effect may be, would seriously cripple the authority and concomitant responsibility which have been given to the Court by the Constitution."

State v. Leonardis, 73 N.J. 360, 375 A.2d 607, 614 (1977). *See also Fehrenbach v. Fehrenbach*, 42 Wis.2d 410, 167 N.W.2d 218 (1969). We certainly do not intend to, and will not, promulgate rules in contravention of the constitutional prohibition against abridging, enlarging or modifying substantive rights. However, to interpret this provision too narrowly effects an equally offensive circumscription of our constitutional duties. As we have stated previously, the legislature is forbidden to act in the field of procedure; we are bound to do so by the terms of our authority. This Court should not be prevented from exercising its duty to resolve procedural questions merely because of a collateral effect on a substantive right. Clearly, Rule 238, when viewed from the perspective of its purpose and goal, contributes to the orderly and efficient administration of justice in Pennsylvania, and must stand.

II.

Rule 238 is also challenged on the ground that it violates both equal protection and substantive due process under the Constitutions of Pennsylvania and the United States.[13]

The requirements of the Equal Protection clause dictate that:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"

Reed v. Reed, 404 U. S. 71, 76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), quoting *Royston Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920). *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979). The concept of equal protection thus demands that uniform treatment be given to similarly situated parties; *Commonwealth v. Kramer*, 474 Pa. 341, 378 A.2d 824 (1977); *Commonwealth v. Webster*, 462 Pa. 125, 337 A.2d 914 (1975). If classifications are drawn, then the challenged policy must be reasonably justified. *Adler v. Montefiore Hospital Ass'n. of Western Pennsylvania*, 453 Pa. 60, 311 A.2d 634 (1973), *cert. denied*, 414 U.S. 1131, 94 S.Ct. 870, 38 L.Ed.2d 755 (1974).

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13. Appellees' contentions concerning the Equal Protection Clause of the federal Constitution and Art. III, § 32 of the Pennsylvania Constitution may be reviewed simultaneously, for the meaning and purpose of the two are sufficiently similar to warrant like treatment. *Baltimore & O.R. Co. v. Commonwealth, Dept. of L. & I.*, 461 Pa. 63, 83, 334 A.2d 636, 643 (1975), and cases cited therein. *In re Cavill's Estate*, 459 Pa. 411, 329 A.2d 503 (1974), *Moyer v. Phillips*, 462 Pa. 395, 341 A.2d 441 (1975), *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978).

The trial court found Rule 238 to be violative of the equal protection standard for two reasons. First, the plaintiffs and defendants were apparently viewed as similarly circumstanced, yet disparately treated because, according to the trial court, "[t]he rule does not provide for delay damages to be awarded to the defendant if it is the plaintiff who is delaying the action." Secondly, the trial court, even when it conceded that the reason for the rule evolved from this Court's desire to speed cases along and reduce backlog, observed,

> "The rule bears no relation to this purpose because the absence of the trial court's discretion eliminates the only opportunity the court system possesses to determine whether delay in fact occurred and who was responsible for it."

By arguing that plaintiffs and defendants are unequally treated, the trial court assumes that for equal protection purposes, these two groups are similarly situated. This is simply wrong. Rule 238 obviously creates distinctions between plaintiffs and defendants. The difference upon which the classification rests is that the plaintiffs have been wrongly injured and have suffered financial losses because of the defendants' action. The losses then become exacerbated by defendants' refusal to settle the lawsuit in a timely fashion. The defendants, on the other hand, have suffered no wrong. They, as the tortfeasors, are not unjustly deprived of compensation during the course of pre-trial delays. On the contrary, it is in the best interests of the defendants to protract the litigation process as long as possible, so that they may benefit from the funds rightfully owing to the plaintiffs.

The crucial question now before us is whether the above distinction advances the objective of Rule 238 in

the manner consistent with the precepts of the Equal Protection Clause. Here, the opinion of the trial court falters in its reliance upon the need for the trial judge's discretionary administration of Rule 238 as a deterrent to pre-trial delay. We believe that the operation of the Rule in question bears a fair and substantial relation to its articulated goal—the encouragement of defendants to settle meritorious claims as soon as is reasonably possible. The policy of uniformly adding pre-judgment interest to all judgments where the defendant did not make any offer of settlement, or where the judgment exceeded the offer by 25%, encourages early activity on the part of the defendants to resolve legitimate claims in an expeditious fashion and deprives them of the opportunity to benefit from needless delays and last-minute settlements. In light of the above, we cannot say that the difference in the treatment of defendants is constitutionally invalid. *See Bullins v. City of Philadelphia, supra.*

Appellees extend the argument of the trial court further and contend that the rule is unfairly applied to all similarly situated defendants because it is invoked in those cases where the plaintiff is causing the delays. However, this allegation is unpersuasive, for in those instances where a reasonable settlement offer is advanced and rejected in bad faith by the plaintiff, the running of the pre-judgment interest is tolled as of the date the offer was made. Consequently, a defendant can always protect himself from the assessment of pre-judgment interest by extending a reasonable settlement offer in a timely manner.

III.

Concomitantly, we do not find Rule 238 to violate substantive due process, as the trial court asserts. The constitutional standard of substantive due process dictates that:

> "[A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained."

Gambone v. Commonwealth, 375 Pa. 547, 551, 101 A.2d 634, 637 (1954).

As seen above, the application of the equal protection standard to Rule 238 requires that the substance of the Rule bear a rational relation to the goal of encouraging settlement offers in tort litigation. The touchstone of substantive due process, as with equal protection, is whether the law in question is rationally related to a legitimate state goal, or whether the state action arbitrarily works to deny an individual of life, liberty, or property. *See Rogin v. Bensalem*, 616 F.2d 680 (3d Cir. 1980), and cases cited therein.

We have already indicated that the pre-judgment interest rule serves the purpose for which it was promulgated. We therefore conclude that it satisfies the due process requirements of the Pennsylvania and United States Constitutions.

There can be no question that the efficacious attempt to clear the dockets as soon as possible of those cases which can and should be settled is a legitimate and worthwhile governmental objective. In truth, appellees do not so attack the objective as being less than valid. They do, however, attempt to demonstrate a lack of rational connection between the challenged provision and the stated purpose by arguing that the Rule discriminates between different groups of defendants. Appellees, relying upon the trial court's rationale, stated in their brief:

> "Implicit in the Lower Court's reasoning is an awareness of the fact that not all defendants are monolithic insurance companies. Rule 238 also stings uninsured defendants who are without the use of reserve funds for investment. Because an object of the Rule, to prevent insurance companies from reaping windfall profits on funds during the pendency of litigation, is not rationally achieved, Rule 238 must be found to be violative of due process in the substantive sense."

As evidenced by appellees' own language, they misstate the aim of the rule by concentrating their attention on one byproduct of the rule. It is true that Rule 238 does disgorge profits on funds placed in reserve by insurance companies for upcoming trials. However, while some defendants may in fact be uninsured, they have nonetheless caused the loss to the plaintiffs by their tortious conduct and owe compensation to their victims. Uniformly, the plaintiffs are the parties prejudiced by the long litigation process; whether the defendants are insured or uninsured does not lessen their loss. The only thing which reduces a plaintiff's loss is an early settlement of his damages. Rule 238 therefore must be viewed as comporting with the constitutional requirements of both equal protection and substantive due process.

We reverse the order of the court below and direct that the verdict be remolded to include damages for prejudgment interest.

Mr. Justice Roberts filed a dissenting opinion.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 80-1-160

REXFORD LAUDENBERGER,
Appellant

v.

PORT AUTHORITY OF ALLEGHENY COUNTY and ARTHUR R. CARTER

v.

FREDERICK E. BUCHEIT,
Additional Defendant

Appeal from the Judgment of the Court of Common Pleas of Allegheny County at G.D. No. 78-5062, entered July 30, 1980.

ARGUED: March 2, 1981.

DISSENTING OPINION

ROBERTS, *J.* FILED: OCTOBER 29, 1981

The majority's perpetuation of Pa. R.Civ.Proc. 238 serves well to demonstrate that it is often more difficult to confess error than to fall into error in the first place. Rule 238, which should never have been promulgated by this Court, see 480 Pa. XLI (1979) (Roberts, J., dissenting), should now be declared unconstitutional.

I

Rule 238 is based on the assumption that the problem of delay in trespass litigation can be solved by compelling defendants to settle early through the imposition of "financial incentives." 1 Goodrich-Amram 2d § 238:1. Accordingly, Rule 238(a) requires a court or arbitrators presiding over an action in trespass to

> "(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum but not compounded, which shall become part of the award, verdict or decision"

and to

> "(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision."

Rule 238(e) provides:

> "If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made."

Thus, a defendant can avoid this mandatory pre-verdict interest only if he is sued immediately after the accrual

of the cause of action, guesses the ultimate amount of the factfinder's verdict, and promptly makes a settlement offer which corresponds with the unknown sum.

II

Pursuant to section 10(c) of the Judiciary Article of the Pennsylvania Constitution, this Court is vested with the authority "to prescribe general rules governing practice, procedure and the conduct of all court . . . ." The same provision of the Judiciary Article expressly provides that rules prescribed by this Court may "neither abridge, enlarge nor modify the substantive rights of any litigant . . . ." Even a most casual reading makes clear that Rule 238 increases the relief available to a plaintiff by mandating the deprivation of a defendant's property. In contravention of the Constitution, the plaintiff's rights have been enlarged, while the rights of the defendant have been abridged.

A

Justice Holmes has observed that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas and Texas Ry. Co. v. May*, 194 U.S. 267, 270, 24 S.Ct. 638, 639 (1904). See *In re William L.*, 477 Pa. 322, 383 A.2d 1228, cert. denied, 439 U.S. 880, 99 S.Ct. 216 (1978). Thus, our Commonwealth's substantive law, regulating citizens' day-to-day conduct, has traditionally been determined through legislative lawmaking and common-law decision. The Legislature, with unique fact-finding capacities designed not only to correct but also to anticipate social problems, both broadly declares public policies and minutely procides for the details of implementation. This Court regulates day-to-day conduct through judicial resolution of specific controversies, apply-

ing common-law techniques to develop an appropriate substantive rule.

Until Rule 238, the availability of interest on judgments had been regulated exclusively by common-law decision and legislative act. At common law, it was determined that the plaintiff "could have execution only for the amount of the judgment without interest. In order to recover that he must resort to a new action." *Stewart v. Peterson's Executors*, 63 Pa. 230, 232 (1869). By the Act of November 27, 1700, the Legislature modified this rule to provide that "[l]awful interest shall be allowed to the creditor for the sum or value he obtained judgment for, from the time the said judgment was obtained till the time of sale, or till satisfaction be made." 1 Sm.L. 7, § 2, formerly 12 P.S. § 782 (1953). The Act of April 6, 1859, P.L. 381, § 1, formerly 12 P.S. § 781 (1953), extended the availability of interest, making interest run as of the date of favorable verdict. Like the previous legislation, this Act responded to a contrary rule at common law which had been reaffirmed only one year earlier in *Kelsey v. Murphy*, 30 Pa. 340 (1858).

In commenting upon the effect of the Act of 1700, making interest an "incident of a judgment," this Court observed that the interest "is a distinctly a substantive part of the debt as if the obligation to pay it was founded on a contract for interest." *Watson v. McManus*, 223 Pa. 583, 588, 72 A. 1066, 1067 (1909). Rule 238 is as much a modification of the availability of interest as the Act of 1700 and the Act of 1859. Like both Acts, Rule 238 has made pre-verdict interest a "substantive part of the debt." See also *Bullins v. City of Philadelphia*, 516 F.Supp. 728 (E.D. Pa. 1981) (Rule 238 remedy is matter of "substantive" law, to be applied in federal diversity case since its availability in state but not federal forum would promote forum-shopping).

The substantive character of Rule 238 is further demonstrated by the recent decision of this Court in *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co.*, — Pa. —, 431 A.2d 966 (1981). There, this Court declined to permit the remedy of punitive damages for an insurer's allegedly "bad faith" conduct in denying the insured's claim. In so holding, this Court relied heavily upon the fact that, in enacting the Unfair Insurance Practices Act, Act of July 22, 1974, P.L. 589, § 1 et seq., 40 P.S. § 1171.1 et seq. (Supp. 1981), the Legislature had already made "dramatic, sweeping efforts" to curb bad faith conduce. This Court observed:

> "There is no evidence to suggest, and we have no reason to believe, that the system of sanctions established under the Unfair Insurance Practices Act must be supplemented by a judicially created cause of action. As one critic of California's approach has observed,
>
> > '[t]he California courts have created this "new tort" in an obvious attempt to afford more protection to insureds. However, it has not really been established that there is a need of this additional protection. * * * State insurance departments are intended to serve the public and handle complaints from insureds as to insurer practices on a regular basis. Likewise, state legislatures are capable of prohibiting what are considered to be unfair claims handling practices and of imposing penalties for violations.'
>
> Kircher, Insurer's Mistaken Judgment—a New Tort?, 59 Marq.L.Rev. 775, 786 (1976)."

— Pa. at —, 431 A.2d at 970.

The majority cannot realistically deny the substantive character of either the Unfair Insurance Practices Act,

which specifically addresses settlement practices, see, e.g., § 5(a)(10)(vi), or the cause of action proposed and rejected in *D'Ambrosio*. The Act regulates conduct by imposing duties and sanctions for their breach, while the proposed cause of action would have enlarged the remedies of the insured.

There can be no basis for viewing Rule 238 any differently. As is recognized by all parties to this controversy, and must be recognized by this Court, the obvious target of Rule 238 is insurance carriers. Like the Unfair Insurance Practices Act and the cause of action proposed in *D'Ambrosio*, Rule 238 prescribes norms for the conduct of insurance carriers and remedies to the insured for departures from the norms.*

B

By expressly denying this Court authority to fashion substantive law through rulemaking, our Constitution contemplates that the fashioning of the rules governing the everyday conduct of the citizens of this Commonwealth will remain a shared function of the common-law tradition and legislative lawmaking. Our rules are not to contravene substantive rights developed on a case-by-case basis and by legislation. Rather, the rules may only erect and adjust the machinery for the enforcement of those substantive rights.

Recent legislative approval of the Act of 1859 and cases of this Court deferring to the legislative judgment

* See also Pennsylvania No-Fault Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, § 106(a)(2), 40 P.S. § 1009.106 (a)(2) (Supp. 1981) (no-fault benefits statutorily deemed "overdue" where not paid within thirty days after insurer's receipt of reasonable proof of loss; "overdue payments" bear interest at rate of 18%); *Hayes v. Erie Insurance Exchange*, — Pa. —, 425 A.2d 419 (1981) (§ 106(a)(2) of No-Fault Act reflects rationally based legislative judgment, not in violation of "substantive due process").

make interest available as of the date of favorable verdict. See 42 Pa.C.S. § 8101; *Waugh v. Commonwealth*, 394 Pa. 166, 146 A.2d 297 (1959); *City of Carbondale School Dist. v. Fidelity & Deposit Co. of Maryland*, 346 Pa. 491, 31 A.2d 279 (1943). However, neither this recent legislation nor our case law supports Rule 238's extension of the availability of interest to the period before verdict. It is utterly inappropriate for this Court, by procedural rule, to create substantive rights and obligations lacking legislative or common-law support.

It is equally inappropriate that the Rule is perpetuated in light of this Court's recent observation in *D'Ambrosio*. There, this Court stated:

> "Surely it is for the Legislature to announce and implement the Commonwealth's public policy governing the regulation of insurance carriers. In our view it is equally for the Legislature to determine whether sanctions beyond those created under the [Unfair Insurance Practices] Act are required to deter conduct which is less than scrupulous."

— Pa. at —, 431 A.2d at 970. Surely under the guise of procedural rulemaking this Court cannot create rights and obligations which by decision it has recently declined to establish.

It is most inappropriate for this Court to have selected a rate of interest of 10%. The selection of a rate of interest of 10% is nothing more than judicial experiment in an area long recognized to be within the exclusive province of the Legislature. The Legislature has determined that rates of interest on verdicts and judgments shall not exceed 6%. See, e.g., Act of January 30, 1974, P.L. 13, §§ 201 & 202, 41 P.S. §§ 201 & 202 (Supp. 1981); Act of May 28, 1858, P.L. 622, § 1, formerly 41 P.S. § 3 (1971). As in *D'Ambrosio*, the expert judgment of our co-equal branch may not be ignored or overridden by this Court.

C

By reserving substantive lawmaking to the common-law tradition and legislative lawmaking, our Constitution also seeks to assure that the substantive rules governing citizens' day-to-day conduct are fashioned in the fairest manner possible. Apart from its impermissible intrusion into the legislative province, unconstitutionally creating substantive law by "procedural" rule, Rule 238 imposes arbitrary, unreasonable, and unequal burdens in the absence of tangible evidence that such measures will serve to accomplish the Rule's intended purpose of eliminating delay.

Rule 238 automatically imposes liability without regard to the good or bad faith of the defendant. One defendant can make a settlement offer which would appear reasonable, and yet be subjected to the 10% penalty if the factfinder's award should exceed the offer by 26%. Another defendant, deliberately offering an unreasonably low sum in an effort to force the plaintiff through litigation, will be automatically relieved of the penalty if the factfinder should enter an award a few dollars less than 125% of the proposed settlement.

Rule 238 imposes a penalty even where the factfinder's award is 125% of the settlement offer. Interest is to be computed either from the date the complaint is filed, or from one year after accrual of the cause of action, whichever is the later date. Rule 238(a)(2). Where a plaintiff files a complaint immediately after the accrual of the cause of action, the defendant has time to evaluate the merits of the complaint tand make a reasoned settlement offer. However, where the plaintiff files a complaint more than one year after accrual, the defendant is immediately subjected to the interest penalty, with no "free time" in which to make a reasoned evaluation of the merits.

The unfairness of Rule 238 is further compounded by its imposition of duties and sanctions only upon defendants, and not upon plaintiffs. If the object of the Rule is to discourage delay, the Rule should not only require defendants to make reasonable settlement offers, but also should require plaintiffs to make reasonable demands. Failure of either party to make a reasonable effort to settle should result in the imposition of similar sanctions.

III

Thus it is clear that, in promulgating Rule 238, a majority of this Court embarked upon a misguided, improper journey, wholly beyond its constitutional procedural rulemaking authority. As a result, the lawmaking function of our Legislature improperly has been usurped. So too, trespass litigants needlessly have been subjected to unfair treatment.

Either of these results would require correction of the Court's error. Together, they compel the need for relief.

Accordingly, to restore not only a proper allocation of the separation of powers but also fairness to litigants, the order of the Court of Common Pleas of Allegheny County declaring Rule 238 unconstitutional should be affirmed.

IN THE
COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. GD 78-5062.
Issue No. 105465.

Laudenberger v. Port Authority of Allegheny County, et al.

BEFORE: SILVESTRI, WEKSELMAN AND ZAPPALA, JJ.

OPINION

SILVESTRI, J., July 25, 1980.—The present case arises out of a collision that occurred on January 30, 1978 between a bus of original defendant, Port Authority of Allegheny County, operated by its employee, Arthur R. Carter, and an automobile operated by additional defendant, Frederick C. Bucheit. The plaintiff, Rexford Laudenberger, was a passenger on the bus, and was standing at the front of the bus preparing to disembark when the collision occurred. He suffered lacerations in his right hand in addition to bruises in his legs. After a trial, the jury returned a verdict in favor of plaintiff in the amount of $85,000, and determined that original defendants were sixty per cent negligent and the additional defendant was forty per cent negligent. Counsel for original defendants and for the additional defendant filed the motions for new trial which we determine herein. The issues raised by the defendants' and additional defendant's motions and briefs overlap to some extent and cover a wide variety of areas, including the permissibility of the taking of certain testimony; the nature of the charges given to the jury; the applicability of Rule of Civil Procedure No. 238; the propriety of the unit of time argument made by plaintiff's counsel; and the question of whether the evidence sup-

ported the jury's verdict. We shall discuss each issue separately after a brief account of the facts of the case.

The collision occurred at about 2:00 P.M. on January 30, 1978, at the intersection of Liberty Avenue and 28th Street in the City of Pittsburgh. At that intersection, Liberty Avenue is a four-lane street with two westbound lanes and two eastbound lanes. 28th Street runs in a general north-south direction and has one lane of traffic in each direction. A traffic signal controls the intersection. The bus was proceeding east in the curb lane for eastbound traffic on Liberty Avenue, while Mr. Bucheit was proceeding north on 28th Street. Mr. Carter, the operator of the bus, testified that when he entered the intersection the traffic signal was green for him, and that the signal changed to green and amber when his bus was in the middle of the intersection. The collision occurred, according to Mr. Carter, only after the signal had changed to green and amber. Mr. Bucheit, the additional defendant, testified that as he drove down 28th Street, the signal at the intersection was red. He stated that he "drifted" down towards the light, looked to the left, and the light changed to green. As he entered the Liberty Avenue intersection, his light was green. He was about ten feet out into the intersection when the collision occurred. The impact was by the left front of Mr. Bucheit's vehicle on the right front corner and front steps and doorway of the bus.

Mr. Laudenberger testified that he saw the traffic signal only when the bus had entered the intersection and that it was amber. Two other passengers on the bus gave testimony that supported the original defendant's version of the collision. Witnesses called by Mr. Bucheit, who were operating other vehicles at the intersection, all agreed that Mr. Bucheit did not move forward until the light was green for him.

We first reject movants' argument that the verdict of the jury was against the weight of the evidence. All the

parties, in addition to several other motorists in the area and two other passengers on the bus, gave evidence as to the circumstances of the collision. The jury's function is to find the facts and weigh them, and in doing so the jury may pass on the credibility of the witnesses giving testimony. In the present case there was no lack of differing accounts of the collision. We shall not supplant the jury and usurp its role in determining credibility of the witnesses and "weighing" the facts. Kopar v Mamone, 419 Pa. 601, 605-6, 215 A.2d 641, 643 (1966).

Original defendants also raise as an issue the permissibility of eliciting testimony concerning a sticking accelerator. On cross examination Mr. Carter was asked if he had trouble with the accelerator sticking on the bus. Counsel for original defendants objected and were overruled. In their brief in support of the motion for new trial, defendants argue that this line of questioning was irrelevant insofar as it related to operation of the bus hours before the accident, and that it was prejudicial because it raised questions relating to maintenance of the Port Authority bus fleet.

The determination of relevancy of evidence is to be made at the discretion of the trial judge, and his rulings may be reversed only if he has abused that discretion. Westerman v Stout, 232 Pa. Super. 195, 335 A.2d 741 (1975). The testimony as to the sticking accelerator may relate to the circumstances of the collision, even if only to suggest that the bus driver's attention may have been partly directed to the accelerator throughout the time he was operating the bus. Furthermore, even if the evidence is irrelevant, reversal and a new trial need not be granted unless the admission of the evidence has been affirmatively harmful. "Our inquiry is whether the court below abused its discretion or committeed an error of law which controlled the outcome of the case . . ." Noel v Puckett, 427 Pa. 328, 332, 235 A.2d 380, 382 (1967). The matter was

raised on cross examination only twice, and briefly. On redirect, the bus driver stated that the accelerator's condition had no effect upon the operation of the bus at the time of the collision. There the matter ended; no party raised it again. In light of the brevity of the topic and the definitive manner in which it was concluded, we cannot find that any great prejudice or harm resulted from the admission of this evidence.

Original defendants also claim that the trial court erred in permitting plaintiff's work supervisor, Richard Glinski, to testify that the plaintiff could no longer operate the employer's machinery. Defendants argue that the testimony should have been excluded for two reasons. First, the plaintiff did not comply with local Rule of Civil Procedure No. 212, which requires that a pretrial statement set forth the findings and conclusion of expert witnesses who will give testimony. Second, a foundation was not laid to demonstrate Mr. Glinski's expertise and a foundation was not laid upon which Mr. Glinski could express an opinion.

We do not find that the opinion expressed by Mr. Glinski was necessarily and technically one resulting from expertise that warrants application of Rule 212 or that requires any greater foundation than that present in the record. Mr. Glinski testified that he had been a supervisor at the St. Regis Paper Company for fifteen of the twenty-five years that he had worked there, and he had supervised the plaintiff when the plaintiff was employed there as a partition machine operator. Mr. Glinski described the operations of the partition machine fully. It was within the proper discretion of the trial judge to permit this testimony because of Mr. Glinski's experience in supervising this type of work. Mr. Glinski based his opinion that Mr. Laudenberger was incapable of operating the machines upon his perception of Mr. Laudenberger's apparent physi-

cal condition, a topic about which even lay witnesses may testify, and upon his knowledge of the physical requirements of the machinery he supervised.

Original defendants also objected to certain testimony of two doctors who treated the plaintiff, Dr. Mallikar Swami who treated the plaintiff at Southside Hospital and Dr. Dwight C. Hanna, who treated the plaintiff at West Penn Hospital.

Defendants objected to the testimony of Dr. Swami because the discharge summary of Southside Hospital attached to the plaintiff's pretrial statement did not state that a causal relation existed between the accident and the plaintiff's thrombophlebitis, for which he was treated at Southside Hospital. The plaintiff was admitted to Southside Hospital on February 10, 1978, complaining of pains in his left leg. Plaintiff was found to have a phlebitic condition, was treated, and was released on March 5, 1978. Following plaintiffs' release, he was treated as an outpatient. Dr. Swami testified that there was an indirect relationship between the hand injury to the plaintiff in the bus accident and the phlebitic condition in his leg because the enforced bed rest plaintiff had in West Penn Hospital was the precursor of the thrombophlebitis. The trial judge did not abuse his discretion in permitting this testimony. As the trial judge pointed out of the record, the diagnosis was "acute thrombophlebitis left leg recent fracture right middle finger due to trauma." This adequately foreshadowed the causal connection about which Dr. Swami testified and defendants cannot be heard to argue that they were surprised. Furthermore, the outpatient care plaintiff received, about which Dr. Swami testified under defendant's objection, was not beyond the scope of the report attached to the pretrial statement, as that report indicated continuing medication and therapy.

Defendants' object to testimony of Dr. Hanna relating to the nature of plaintiff's permanent disability in his use of the injured hand. Dr. Hanna had treated the plaintiff at West Penn Hospital for his fractured wrist immediately after the injury and again when plaintiff returned to West Penn on April 7, 1978 for further treatment of his hand, at which time it was determined that the hand had become infected and immobilized. Defendants argue that the hospital reports and Dr. Hanna's letter attached to the plaintiff's pretrial statements do not make any conclusion regarding the degree of plaintiff's disability, and, therefore, that Local Rule 212 prohibits Dr. Hanna from giving expert testimony regarding disability. The trial court in the proper exercise of its discretion permitted the testimony of Dr. Hanna relating to permanent disability, citing the following portions of the statement of Dr. Hanna attached to the pretrial statement; ". . . the patient had good flexion and extension of all fingers except the middle finger which had only 65° flexion at the MP joint, 40° flexion at the PIP joint and no flexion at the DIP. The PIP joint would extend to 60°."

And, further, "He has very little function of this finger in view of the unrepaired flexor tendons."

In view of the necessary consequences of these diagnoses, we do not find that any expert testimony related to disability would subject defendants to undue surprise.

Original and additional defendants also objected to the refusal of the trial judge to charge the jury according to certain points they had submitted. Most of these matters were adequately covered by the trial judge's own charges. The trial judge's charge that the jury apply tests of credibility to the medical testimony was a sufficient alternative to the requested charge concerning opinion testimony.

Additional defendant Mr. Bucheit's counsel requested charges that a driver entering an intersection with a green

light does not have to give his attention to the traffic along the intersecting street. He also stated that his understanding of the charge given by the trial judge misled the jury by imposing a high degree of care upon operators with a green light at an intersection. The trial judge's charge was correct and not misleading. Blind reliance on a favorable traffic signal may be held to constitute negligence, Hoover v Sackett, 221 Pa. Super. 447, 292 A.2d 461 (1972). A green light provides merely a qualified permission to proceed carefully, Smith v United News Co., 413 Pa. 243, 196 A.2d 302 (1964). As the trial judge charged, "With the green light you still must look to see if there is any traffic that has entered the intersection or is about to enter the intersection."

Original defendants also objected to the refusal of the trial judge to give its requested charge on the plaintiff's duty to mitigate damages. It is the position of defendants that the failure of Mr. Laudenberger to have his bandaged hand examined while he was being treated at Southside Hospital for thrombophlebitis led to the hand infection which contributed to his disability. It was properly within the trial judge's discretion to determine whether defendants had met their burden of proof with regard to plaintiff's failure to mitigate damages. Mr. Laudenberger testified that while he was in Southside Hospital his hand continued to throb when not held high as he had been instructed to do by Dr. Hanna at West Penn Hospital. The throbbing sensation may not have seemed unusual to him. Furthermore, Mr. Laudenberger had been told by a head nurse at Southside Hospital that she was in contact with Dr. Hanna's office. Therefore, Mr. Laudenberger may have been assured of the immateriality of his delay in returning to Dr. Hanna to have his hand examined, especially in light of his immobile condition at Southside Hospital. Defend-

ants have failed to demonstrate any facts demonstrating that Mr. Laudenberger failed to take proper care of himself under the circumstances; the issue of mitigation of damages was not sufficiently raised.

Additional defendant objected to a series of statements made by plaintiff's counsel, Mr. King, at summation. The trial judge indicated for the record that "When Mr. King was addressing himself to the argument of pain, suffering and inconvenience, he alluded not only to the time immediately following the accident, but also to the hospital, the operative procedure, and he said how much is it for a second, a minute, is it a dollar, is it ten dollars." Defendants objected to Mr. King's statements, characterising them as an improper "unit of time" argument. The practice of segmenting damages into fragments and applying them to a mathematical formula to arrive at a damage figure has been widely condemned as misleading insofar as it substitutes a lawyer's contrust for evidence in the minds of the jurors and seems to give solidity and certainty to a subject that is inherently various and insubstantial. However fallacious and undesirable such arguments may be, the argument under consideration here did not posit exact mathematical formula, but was used in an illustrative fashion to indicate the difficulty in evaluating great pain and discomfort. Some courts, although disapproving the use of time arguments, do permit them for such illustrative purposes. Boutang v Twin City Motor Bus Co., 248 Minn. 80 N.W. 2d 30 (1956). Furthermore, during the court's charge in the present case, the judge's instruction on the question of damages for pain and suffering was sufficient to vitiate any misleading tendencies plaintiff's counsel may have initiated. The trial judge stated, "For pain and suffering . . . there is not and cannot be a fixed standard of measurement . . . there are two sound principles . . . first, the only intention of the law is to compensate or make

whole . . . second, it must be compensation founded in reason, unaffected by any pity or sympathy for him or bias or prejudice or anger against (defendants) . . . the law leaves the ascertainment of the proper amount to your good judgment, common sense and practical knowledge." In light of this charge, we cannot find error in the failure to instruct the jury regarding Mr. King's argument.

Original defendants filed a Motion to Remold the Verdict, which was briefed in their brief in support of motion for new trial. Original defendants argue that plaintiff's motion to mold verdict in accordance with Rule of Civil Procedure No. 238* (to add interest for defendants' delay) followed the jury's return of the verdict by one day and was therefore untimely. Furthermore, they argue that the Rule itself is unconstitutional as violative of due process and equal protection under both the United States and Pennsylvania Constitutions.

We find that Rule of Civil Procedure No. 238 is unconstitutional, as it breaches the proper separation of powers envisioned in the Pennsylvania Constitution. According to the portion of the Constitution relating to Judicial Administration, "The Supreme Court shall have the power to prescribe general rules governing practice, procedure, and that conduct of all courts . . . if such rules are consistent with this Constitution and neither abridge, enlarge, nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose . . ."Pa. Const. Art. 5 § 10(c). This section and its limitations were abrogated when the Supreme Court promulgated Rule 238 allowing delay damages in the form of prejudgment interest. Such interest is substantive, not procedural, and is thus within the domain of legislative power.

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* See Appendix A.

Of the nine states other than Pennsylvania that have adopted delay damages or prejudgment interest rules, all but one, New Jersey, have adopted the rule by way of legislative enactment.[1] In Busik v Levine, 63 N.J. 351, 307 A.2d 571 (1973) the New Jersey Supreme Court upheld the validity of the rule it had adopted earlier. The rationale of the Busik decision is based on a tradition of New Jersey law which is instructive in the way it contrasts with the law of Pennsylvania. According to the plurality opinion in Busik (in which three judges joined), "Although it is said with respect to interest on claims that in this country interest is generally of statutory origin, Consolidated Police and Firemen's Pension Fund Commission v City of Passaic, 23 N.J. 645, 653, 130 A.2d 377, 382 (1957) the contrary is true in our state . . . (Apart from usury statutes) there is no statute dealing with interest upon . . . obligations or claims or with interest upon judgments. The controlling rules have always been and remain judge-made. (citations omitted)" 307 A.2d at 573-74. The central importance of the history of judicial rule-making regarding interest in New Jersey in upholding the prejudgment interest rule is displayed in the concurring opinion of the two "swing" votes on the bench. The concurring opinion chose to ignore the plurality's lengthy discussion of substance-procedure dichotomy, and affirmed the rule simply because "the legislature of this state has never acted generally in the area of pre-judgment and post-judgment interest and the matter has historically been left to the judiciary." at 584. In light of this history, the concurring Justices found "sufficient procedural aspects" to justify the

1. The states with statutes are as follows: Colorado: Rev. Stats. 1963, Ann., § 41-2-1; Louisiana: LSA-R.S. 13:4203; Michigan: Stat. § 27A.6013, N.C.L.A. § 600.6013; New Hampshire: RSA § 524:1-b (Supp.); New York: CPLR § 5001(a); North Dakota: N.D.C.C. § 32-03-05; Oklahoma: 2 Okla. St. Ann. § 727(2); Rhode Island: Gen. Laws, § 9-21-10.

court's adoption of the rule. However, the concurring Justices' discomfort with this result was betrayed in the following paragraph, in which they recommended cooperation between the branches of government to work out such rules, as had existed in the adoption of the state's rules of evidence, and even suggested future examination of and legislative action on the pre-judgment rule "in the light of the substantive aspects (of it)."

In Pennsylvania, interest on verdicts and judgments has been governed by statute, 12 P.S. §§ 781, 782 (enacted in 1859 and 177 respectively), (Repealed); Act of 1976, July 9, P.L. 586, No. 142§ 2, 42 Pa. C.S. § 8101. Not only does the New Jersey experience and decision not provide a rationale for support of Pennsylvania Rule 238, but it affirmatively demonstrates the extent to which the Pennsylvania Supreme Court transcended constitutional bounds in promulgating the rule.

Distinguishing between the substantive and the procedural is rarely a simple task. As was noted in Hanna v Plumber, 380 U.S. 460, 471 (1965), "The line between 'substance' and 'procedure' shifts as the legal context changes." However we might wish to avoid the issue, the constitutional provision relating to judicial administration grants power to the Supreme Court to prescribe rules relating only to procedure, and specifically withholds the power to make rules affecting substantive rights of litigants. Generally, laws which fix duties, establish rights and create liabilities are substantive in character while those which merely prescribe the manner in which rights may be exercised and liabilities enforced in a court are procedural. Delay damages or prejudgment interest must be considered part of the damages caused by the initial wrong. Surely, then, recovery of these damages constitute a substantive right of the claimant and payment by the defendant constitutes a corresponding liability. It is the

position of the traditional lex loci delicti approach of conflicts of laws, an area in which the substance-procedure distinction maintained a great importance, that interest as a part of damages is substantive, 22 Am. Jur. 2d, Damages, § 3, pp. 15-16. Restatement 2d, Conflict of Laws (1971) §§ 145, 171. Further, interest has been considered substantive for purposes of application of state rather than federal law in diversity cases, 36 C.J.S. "Federal Courts" § 189(8), p. 496 (1960); New Amsterdam Casualty Co. v Soileau, 167 F.2d 767, 771, 772 (5 Cir. 1948) cert. denied 335 U.S. 822, 69 S. Ct. 45 (1948).

As this court stated in Luskey v Steffron, Inc., No. 2850 January Term, 1974, aff'd. 461 Pa. 305, 336 A.2d 298 (1975), rehearing 469 Pa. 377, 366 A.2d 223 (1976). "The Supreme Court of Pennsylvania is an institution of government and is clothed with the power to finally state the law of Pennsylvania." Whereas we stated in that case that the Supreme Court is subject to the precepts of Equal Protection and Due Process, we now reaffirm our belief that the Supreme Court, as an arm and institution of government is equally bound by the scope of powers entrusted to it under the Constitution.

We also find Rule 238 to violate equal protection and due process under both the United States and Pennsylvania Constitutions. "The starting point of equal-protection analysis is a determination whether the State has created a classification for the unequal distinction of benefits or imposition of burdens." Commonwealth v Webster, 462 Pa. 125, 337 A.2d 914 (1975); Singer v Sheppard, 464 Pa. 387, 346 A.2d 897 (1975). Rule 238 permits only the plaintiff to benefit from delay, granting the defendant an exemption from the damage surcharge only if the verdict does not exceed 125% of an offer made by defendant. The rule does not provide for delay damages to be awarded to the defendant if it is the plaintiff who is delaying the

action. The mandatory language of the rule precludes the court from using its discretion to determine the propriety of awarding these damages. If the reason for the rule lies in the court's desire to speed cases along and reduce backlog, the rule bears no relation to this purpose because the absence of the trial court's discretion eliminates the only opportunity the court system possesses to determine whether delay in fact occurred and who was responsible for it. The rule thus fails the traditional "rational basis" test of equal protection, under which test classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." Reed v Reed, 404 U.S. 71, 75-76, 30 L.Ed. 2d 225 (1971); Alder v Montefiore Hospital of W. Pa., 453 Pa. 60 (1973). We are not passing upon the wisdom of the rule, which, of course, could have no effect upon constitutional analysis, but upon the relation between the rule and its object. It is the rule's mandatory, unfair, and unequal imposition of burdens upon one party in all instances that prevents it from having its desired effect upon the efficiency of the court system.

This lack of a reasonable relation between Rule 238 and its object also leads us to the conclusion that adoption of the rule violated due process in the substantive sense. The guiding proposition in this area is that "a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained "Cambone v Commonwealth, 375 Pa. 547 at 551, 101 A.2d 634 at 637 (1954).

The rule lacks a reasonable relation to its desired object not merely because it discriminates unfairly between

plaintiffs and defendants, either group of which may be responsible for delay, but also because it doesn't discriminate fairly enough between groups of defendants. If the theory underlying the rule is that the real defendant parties, insurance companies, have the use of plaintiffs' money for the time before a verdict is rendered, why must an individual defendant in a personal injury case, who is not represented by an insurance company, be subject to what must be for him a tremendous exaction of funds which he did not have the ability to use or invest, or which he did not have the ability to use in as knowledgeable a manner as an insurance company. As stated earlier, we feel that the Supreme Court as an arm of government is as subject to the rigors of due process in its rule-making capacities as is the legislature in its capacities.

Because we find Rule 238 to be unconstitutional, we do not reach the question whether plaintiff's motion to remold the verdict under the rule was timely filed.

The dissent, while agreeing with our analysis and conclusions relative to Pa. R. C. P. 238, argues that the trial court is without authority to pass upon the validity of a Rule promulgated by the Supreme Court.

It is the function and the duty of the trial court to consider and pass on all points properly raised in post trial motions. The Superior Court, citing our Supreme Court, in Mundy v Acme Markets, Inc., 225 Pa. Super. 63, 310 A.2d 393 (1973), said:

> "A number of reasons compel the conclusion that each point in favor of a new trial should be considered by the lower court at the time it rules upon the motion. First, it is in the interest of the moving party that a full consideration be accorded the motion. Provided an application for a new trial has been made in proper form and in due time, and movant has taken

proper steps to obtain a hearing and determination thereof, he has a right to have the merits of the application considered or heard and passed on or determined judicially, after full deliberation and the exercise of the court's best judgment.' 66 C.J.S. New Trial §195, at 463 (1950) (footnotes omitted). See 28 P.L.E. New Trial §81 (1960). Second, an examination by the lower court of the applicant's legal theories is of benefit to an appellate court. The necessity of appeal may be eliminated by a full evaluation of the motion. See Commonwealth v. Starr, 450 Pa. 485, 301 A.2d 592 (1973) (possibility that lower court's disposition of motion will obviate need for appeal noted in discussion of value of making post-trial motions to lower court following conviction of first degree murder after plea of guilty to murder generally); Commonwealth v Robinson, 442 Pa. 512, 276 A.2d 537 (1971) (same). And in the event an appeal occurs, the rationale of a competent court, such as that below, in disposing of a motion is of inestimable value to an appellate court. See Chartiers Valley B. & L. Ass'n. v Ende, 281 Pa. 396, 126 A. 763 (1924).

"Furthermore, it has been said in Pennsylvania that '(w)here a motion for a new trial is heard before a court en banc, it is the duty of all the sitting judges not only to hear the motion but subsequently to meet together, and discuss and determine the matters presented to them (citations omitted).' Dobson v Crafton Borough, 315 Pa. 52, 55, 172 A. 109, 110 (1934). It would be anomalous, in view of this rule, to hold that a single judge, in disposing of such a motion, need not review all of the reasons for the motion.

"Finally, to eliminate the need for full consideration by the court below would cause the assumption by an appellate court of a function within the province of a lower court. Such a result is to be avoided. See Dunshee v Dunshee, 234 Pa. 550, 83 A. 422 (1912).

An appropriate order shall be entered denying original and additional defendants' motions for new trial, but granting original defendants' motion to remold the verdict.

APPENDIX A

Rule 238. Award of Damages for Delay in an Action for Bodily Injury, Death or Property Damage

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators appointed under the Arbitration Act of June 16, 1836, P.L. 715, as amended, 5 P.S. § 30 et seq., or the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, 40 P.S. § 1301.101 et seq., shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict or decision;

(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision.

(b) In arbitration under the Act of 1836, the amount of damages for delay shall not be included in determining whether the amount in controversy is within the jurisdiction of the arbitrators.

(3) Except as provided in subdivision (e), damages for delay shall be added to the award, verdict or decision against all defendants found liable, no matter when joined in the action.

(d) The court may, and on request of a party shall, charge the jury that if it finds for the plaintiff, it shall not

award the plaintiff for delay because this is a matter for the court.

(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made.

(f) If an action is pending on the effective date of this rule, or if an action is brought after the effective date on a cause of action which accrued prior to the effective date, damages for delay shall be computed from the date plaintiff files the initial complaint or from a date one year after the accrual of the cause of action, or from a date six (6) months after the effective date of this rule, whichever date is later.

(g) This rule shall not apply to

(1) eminent domain proceedings;

(2) pending actions in which damages for delay are allowable in the absence of this rule.

Adopted Nov. 20, 1978, effective 120 days after Dec. 16, 1978

ORDER

AND NOW, this 25th day of July, 1980, after oral argument, consideration of the record and briefs of the parties, we hereby deny original defendants' and additional defendant's motion for new trial, and we grant original defendant's motion to remold the verdict. A verdict is entered in this case in favor of the plaintiff and against the original defendants and the additional defendant in the amount of $85,000.00, consistent with the percentage of negligence found by the jury;

FURTHER, the Order of March 20, 1980 adding interest consistent with Pa. R. C. P. 238 is vacated.

BY THE COURT:
/s/ SILVESTRI, J.

Eo die, exceptions noted and bill sealed.

BY THE COURT:
/s/ SILVESTRI, J. (SEAL)

I concur.

/s/ ZAPPALA, J.

Wekselman, J. files a separate opinion in which he concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur in that portion of the opinion and order which denies a new trial but dissent from that portion of the opinion which holds that Rule 238, Pa. R.C.P., is unconstitutional and from that portion of the order which remolds the verdict.

The majority has concluded that Rule 238 is unconstitutional in that the Supreme Court exceeded its authority in promulgating the Rule. The Rule, which was adopted on November 20, 1978, and effective April 15, 1979, directs that in actions "seeking monetary relief for bodily injury, . . . the court *shall* (1) add to the amount of compensatory damages . . . in the verdict of a jury, . . . damages for delay at ten (10) percent per annum, not compounded, which shall become part of the . . . verdict . . ." (Emphasis supplied.) The award of damages for delay is not a matter of grace but of right in accordance with the provisions of the Rule.

The majority in a very cogent analysis has determined that the award of prejudgment interest is a matter of substantive law and not of procedure and is, therefore, not within the rule-making power of the Supreme Court. The majority has further concluded that the Rule is violative of due process and equal protection provisions of both the Pennsylvania and United States Constitutions in that it imposes delay damages only on defendants and not on plaintiffs who may have caused delays. My objection to the order remolding the verdict is not necessarily based upon any disagreement with the reasoning of the majority which led to its conclusions. Rather, my objection is based upon my conception of what orderly administration of the judicial process requires.

At least since the adoption by the voters of Pennsylvania in 1968 of the new Judiciary Article of the Pennsyl-

vania Constitution which became effective January 1, 1969, the ultimate authority of the Pennsylvania Supreme Court over a unified judicial system has been clear. The Pennsylvania Supreme Court has been granted rule-making authority by the Constitution and the Rules which it promulgates are binding upon the trial courts.

In the specific instance of the adoption and promulgation of Rule 238, the very questions addressed by the majority must have been considered and decided by the Supreme Court. It must be noted that Mr. Justice Roberts of the Supreme Court dissented from the adoption and promulgation of the Rule. In his dissenting statement, Mr. Justice Roberts concluded that the Rule dealt with a matter of substantive law and was therefore properly a matter for legislative action by the General Assembly rather than for the court's rule-making procedures. The only reasonable inference to be drawn from that fact is that the matter was one which was considered by the Supreme Court and resolved adversely to the position adopted by the majority of this court en banc. Whether I believe that the Supreme Court was correct in its conclusion is of no moment in the instant proceeding. The body which has the authority to direct the activities of the Pennsylvania trial courts has established a procedure for the addition of prejudgment delay damages to jury verdicts in certain instances, and I believe that only that body has the authority to alter that direction. It is not for the trial courts of Pennsylvania to chose which of the Rules promulgated by the Supreme Court they will follow. I believe that it is the obligation and duty of the trial courts to adhere to those Rules irrespective of the views of the trial judges on their propriety. Those who conceive themselves to be aggrieved by the enforcement of those Rules, of course, have the option of seeking relief in the appropri-

ate appellate court and, ultimately, in the Supreme Court itself.

Orderly judicial administration dictates that an attack on a Rule of Civil Procedure governing the business of the courts be made by an aggrieved party rather than by a tribunal inferior to and under the direction of the tribunal which promulgated the Rule. I would, therefore, deny the motion to remold the verdict, leaving the defendants to pursue their contention with respect to the impropriety of the Rule. Should the Supreme Court ultimately determine that the Rule is unconstitutional, it may take the appropriate action, which action I believe not to be within the prerogatives of the trial courts.

RULES AND STATUTES INVOLVED.

Pennsylvania Rules of Civil Procedure

Rule 238. Award of Damages for Delay in an Action for Bodily Injury, Death or Property Damage

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators appointed under the Arbitration Act of June 16, 1830, P.L. 715, as amended, 5 P.S. § 30 et seq., or the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, 40 P.S. § 1301.101 et seq., shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict or decision;

(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision.

(b) In arbitration under the Act of 1836, the amount of damages for delay shall not be included in determining whether the amount in controversy is within the jurisdiction of the arbitrators.

(c) Except as provided in subdivision (e), damages for delay shall be added to the award, verdict or decision against all defendants found liable, no matter when joined in the action.

(d) The court may, and on request of a party shall, charge the jury that if it finds for the plaintiff, it shall not award the plaintiff any damages for delay because this is a matter for the court.

(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made.

Note of the Procedural Rules Committee: In additional defendant proceedings, the additional defendant will be considered the "defendant", for purposes of this subdivision, and the "plaintiff" will be either the original defendant if liability over is claimed, or the original plaintiff if direct liabilty is claimed, or both if both forms of liability are claimed.

(f) If an action is pending on the effective date of this rule, or if an action is brought after the effective date on a cause of action which accrued prior to the effective date, damages for delay shall be computed from the date plaintiff files the initial complaint or from a date one year after the accrual of the cause of action, or from a date six (6) months after the effective date of this rule, whichever date is later.

(g) This rule shall not apply to

(1) eminent domain proceedings:

Note of the Procedural Rules Committee: See Article VI, Sec. 611 of the Eminent Domain Code of 1964, Special Session, June 23, P.L. 84, 26 P.S. § 1-611, governing compensation for delay in payment.

(2) pending actions in which damages for delay are allowable in the absence of this rule.

Note of the Procedural Rules Committee: See Marrazzo v. Scranton Nehi Bottling Co., Inc., 438 Pa. 72, 263 A.2d 336 (1970), for instances in which compensation for delay may be allowed in trespass actions for destruction or involuntary conversion of property where the compensation can be measured by market value or other definite standards.

History: New Rule 238 was promulgated November 20, 1978, Effective April 15, 1979.

EXPLANATORY COMMENTS

The judicial system has long been vexed by the problem of congestion and delay in the disposition of civil actions for bodily injury, death or property damages pending in the trial courts. Various techniques, such as compulsory arbitration, have helped to dispose promptly of the bulk of such cases in amounts under $10,000 in Philadelphia and Allegheny Counties and under $5,000 in other counties which have adopted compulsory arbitration. Nevertheless, there is still a considerable residue of so-called major cases not presently subject to arbitration. There are also the appeals from arbitration which require further proceedings in the trial court.

Statistics show that only 38 percent of these cases ever go to trial and only 25 percent ever go to verdict. Thirty-eight percent are settled without going to trial. Some are settled through pretrial conciliation techniques, but in too many cases meaningful negotiations commence only after a trial date is fixed or on the courthouse steps or in the courtroom, thus leading to delay in the disposition of cases and congestion in the courts. The present practice provides no incentive for early settlement.

In the usual civil action for bodily injury, death or property damage there is no compensation to the successful plaintiff and no sanction against the defendant for the long delay between commencement of the action and the trial. A survey of procedures in other jurisdictions discloses that a number of states by rule or statute provide for damages for delay in these cases ranging from six to nine percent of the ultimate verdict.

Such procedure is in effect in Colorado, Michigan, New Hampshire, New Jersey, New York, Oklahoma and Rhode Island.

The New Jersey Supreme Court Rule, sustained in *Busik v. Levine*, 63 N. J. 351, 307 A.2d 571 (1973), cer-

tiorari denied for want of a substantial Federal question, 414 U. S. 1106 (1973), is illustrative. It provides for the addition of eight percent to the award in all tort actions, including products liability actions, commencing from a date six months after the date of the tort or six months after commencement of the action, whichever is later.

Proposed Rule 238 considers a number of situations not covered in the rules of other states. It provides as follows:

First, damages for delay in this type of case will be added at the rate of ten percent per annum to jury verdicts, decisions of the court in nonjury cases and arbitrators' awards. Ten percent is considered a more meaningful figure in the light of present high interest rates at which a defendant can earn eight percent or more on reserves or retained funds with reasonable safety. There is no financial incentive to the defendant to settle early.

Second, the proposed rule provides in subdivision (a2) that damages for delay do not begin to run until the date the complaint is filed or one year from the date the cause of action accrues, whichever is later. A one-year period to ascertain permanent injuries in personal injury cases and for the parties to conduct settlement negotiations does not seem to the Committee excessive, particularly in major cases.

Third, the proposed rule, in subdivision (e), contains an exoneration clause enabling a defendant to exclude or reduce any damages for delay if he makes an adequate written offer of settlement specifying prompt cash payment which is not accepted. The defendant is thus protected against the arbitrary refusal of a plaintiff to accept what ultimately turns out to have been a reasonable settlement offer. Recognizing that reasonableness of demand or offer cannot be calculated with mathematical precision, a 25 percent margin is supplied and the plaintiff must re-

cover more than 125 percent of the offer in order to secure damages for delay for any period after the date of the offer.

Fourth, recognizing that additional defendants may often be involved, and in some cases may even be joined after the initial one-year period has expired and damages for delay begin to accrue, an additional defendant who is joined at a late date must nevertheless protect himself by a written offer of settlement under subdivision (e). While there may be some equities in favor of an additional defendant who is joined at a much later date as to when damages for delay should accrue, the drafting of a rule to incorporate permutations and combinations of multiple defendant practice, depending upon the time at which they are joined and the nature of their alleged liability, introduces uncertainties in the application of the rule. The additional defendant can protect himself by making an adequate written offer of settlement.

Fifth, to protect defendants in jury trials from possible incurrence of double damages for delay, first by having the jury include such damages in its general verdict, and then by the court's addition of such damages to the verdict, subdivision (d) provides that the court on request of a party may charge the jury that it is not to award any damages for delay because this is a matter for the court.

Sixth, as to actions pending on the effective date of the rule, the time for commencement of damages for delay differs in that it is at least six months after the effective date. If a plaintiff has filed a complaint, the damages for delay commence one year after the date the cause of action accrued or six months after the effective date of the rule, whichever is later. If the plaintiff has not filed a complaint, the damages for delay are computed from the date the plaintiff files the initial complaint, or one year after the date the cause of action accrued or six months after the

effective date of the rule, whichever is later. A similar schedule is provided for the case where the cause of action arises prior to the effective date, but no action has been brought by the effective date.

Seventh, the rule will not apply to eminent domain proceedings, which have their own statutory provisions for compensation for delay. Nor will it apply to any pending actions for damages to property in which damages for delay are already allowable under prior decisions of the Court, e.g., *Marrazzo v. Scranton Nehi Bottling Co., Inc.*, 438 Pa. 72, 263 A.2d 336 (1970), in which compensation for delay may be allowed in trespass actions for destruction or involuntary conversion of property where the compensation can be measured by market value or other definite standards. These pending cases will be disposed of under the standards set forth in *Marrazzo*, supra. However, all new actions of the *Marrazzo* character commenced after the effective date of proposed Rule 238 will be governed by the provisions of the rule.

By order of the Civil Procedural Rules Committee

PHILIP W. AMRAM,
Chairman

NEW JERSEY STATUTE (1981)

R. 4:42-11. Interest; Rate on Judgments; in Tort Actions

(a) Rate. Judgments, awards and orders for the payment of money and taxed costs shall bear simple interest on the amount of the award at 12% per annum from the date of entry, except as otherwise ordered by the court and except as may be otherwise provided by law.

(b) Tort Actions. Except where provided by statute with respect to a public entity or employee, and except as otherwise provided by law, the court shall, in tort actions, including products liability actions, include in the judgment simple interest at 12% per annum on the amount of the award from the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest. The contingent fee of an attorney shall not be computed on the interest so included in the judgment.

Note: Adopted December 21, 1971 to be effective January 31, 1972. Paragraph (b) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) and (b) amended July 29, 1977 to be effective September 6, 1977; paragraphs (a) and (b) amended July 16, 1981 to be effective September 14, 1981.

NEW JERSEY STATUTE (1972)

R. 4:42-11. Interest: Rate on Judgments; in Tort Actions.

(a) *Rate.* Judgments, awards and orders for the payment of money and taxed costs shall bear interest at 6% per annum from the date of entry, except as otherwise ordered by the court.

(b) *Tort Actions.* In tort actions, including products liability actions, the court shall include in the judgment interest at 6% per annum on the amount of the award from the date of the institution of the action or from a date 6 months after the date of the tort, whichever is later. The contingent fee of an attorney shall not be computed on the interest so included in the judgment.

IN THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA

No. 80-1-160

FREDERICK E. BUCHEIT

Appellant

v.

REXFORD LAUDENBERGER

Appellee

and

PORT AUTHORITY OF ALLEGHENY
COUNTY and ARTHUR R. CARTER

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed January 26, 1982)

Notice is hereby given that Frederick E. Bucheit, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Pennsylvania, reversing the trial court's decision that Rule 238 of the Pennsylvania Rules of Civil Procedure as applied to appellants is repugnant to the United States Constitution, entered in this action on October 29, 1981.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

WHITE AND WILLIAMS
BY /s/ RICHARD M. JORDAN
Richard M. Jordan
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Philadelphia, PA 19107
(215) 854-7074
Counsel for Appellant

Motion to Dismiss or Affirm

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1426

IN THE

Supreme Court of the United States

October Term, 1981

FREDERICK E. BUCHEIT,
Appellant
v.
REXFORD LAUDENBERGER,
Appellee
and
PORT AUTHORITY OF ALLEGHENY COUNTY
and ARTHUR CARTER,
Appellee

On Appeal From the Supreme Court of Commonwealth of Pennsylvania

MOTION TO DISMISS UNDER RULE 16
STATE CIVIL CASE

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STATEMENT OF THE CASE

Pennsylvania Rule of Civil Procedure 238 hereinafter (Rule 238) (The text of Rule 238 appears in Appendix A) provides for Pre-Judgement damages for delay, (computed as interest) to be added to an award or verdict in civil cases for personal injury and property damage if certain conditions are met. The purpose of the rule is two-fold. To more fully compensate injured parties because of the delay they suffer in receiving their just compensation; and to encourage early and prompt settlement so as to improve the orderly and administrative efficiency of the court system. The objective was not, as contended by Appellant, to penalize a Defendant who seeks a Court trial to resolve a legitimate dispute. Rule 238 was held to be constitutional by the Supreme Court of Pennsylvania as furthering a compelling state interest, and that judgement should not be disturbed.

January 30, 1978, Rexford L. Laudenberger, Plaintiff-Appellee (hereinafter Appellee Laudenberger) was a passenger on a bus owned by the Port Authority of Allegheny County and operated by its employee Arthur R. Carter (hereinafter Appellee PAT). The bus collided with a motor vehicle operated by Frederick E. Bucheit Defendant-Appellant, (hereinafter Appellant). Appellee Laudenberger was injured and at trial the jury awarded him $85,000. Appellant was found to be 40% negligent and Appellee PAT 60% negligent. Neither Appellant nor Appellee PAT had made any written offer of settlement before Trial so as to obtain the protection Rule 238 provided for them. Appellee Laudenberger after verdict, moved to add interest in accordance with Rule 238. The motion was granted then subsequently reversed by the Common Pleas Court en-banc, declaring Rule 238 unconstitutional. An Appeal to the Supreme Court of Pennsyl-

vania resulted in that Court reversing and holding that Rule 238 was and is not violative of the Due Process and Equal Protection Clauses of the Constitution.

Appellee PAT did not appeal from the decision of the Supreme Court of Pennsylvania holding that Rule 238 is constitutional. There is no issue on any question of liability or damages. The only question before the Supreme Court of Pennsylvania and now before the Supreme Court of The United States is whether Rule 238 violates the Equal Protection Clause and Due Process of the Constitution of the United States.

ARGUMENT

I. The constitutionality of Rule 238 providing for Pre-Judgement interest in certain instances does not present a substantial federal question and does not warrant review by the Supreme Court of the United States.

Rule 238 does not violate the Equal Protection and Due Process Clause of the United States Constitution. Essentially, the same questions raised by Appellant in the instant case were presented to the Supreme Court of the United States in the Appeal of *Busik vs. Levin*, 63 N.J. 351, 307 A.2d 571 and the United States Supreme Court dismissed that Appeal *for want of a substantial federal question, 414 U.S. 1106 (1973).* In rejecting 14th Amendment challenges to Rule 238 (which was modeled upon a similar rule adopted in New Jersey, R 4:42 - 11 (b)) the Supreme Court of Pennsylvania relied upon Chief Justice Weintraub's opinion in Busik, supra.

Nine other states have similar Pre-Trial (Judgement) interest provisions.[1] Eight have provided this by legislative enactments and New Jersey and Pennsylvania have done so by Rule of Court.

In every case in which a Pre-Judgement interest (damage for delay) rule or law has been challenged on constitutional grounds, the constitutionality of the rule or law has been upheld.

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1. Colorado: Col. Rev. Stat. Ann. 1973 § 13-21-101; Louisiana: LSA-RS. 13:4203; Michigan: MCL § §)§).§13; New Hampshire: N.H.R.S.A.§ 524:1-6 (Supp.); North Dakota: N.D. S 32-03-05; Oklahoma: 12 Okla. St. Ann. § 727 (a) Rhode Island: R.I. Gen. Laws § 9-21-10; South Dakota S.D.C.L. 1967 Ann. § 21-1-11 for Pre-Judgement interest statutes, and New Jersey Rule of Civil Procedure 4:42-11 for a judge-made rule.

Busik v. Levine, 414 U.S. 1106, (1973) 63 N.J. 251, 307 A2d 571. *Roy v. Star Chopper Co., Inc.*, 584 F2d 1124 (1st Cir. 1978) *Riley v. Savary*, 120 N.J. Super 331 (1972) *Glick v. White Motor Co.*, 458 F. 2nd 1287 (3rd Cir. 1972).

In reviewing a state statute or constitutional provision under the Due Process or Equal Protection Clause, a Court must determine if the provision rationally furthers any legitimate state objective. As was said in Flemming v. Nestor: "For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," *Flemming vs Nestor 363 U.S. 603, 612, 80S. Ct 1367, 1373, 4 L. Ed 2d 1435 (1960); Malmed vs. Thornburgh, 621 F2d 565 (1980).*

The purpose for this rule as announced by the Supreme Court of Pennsylvania in explanatory comment through its Civil Procedural Rules Committee was to help solve the problem of congestion and delay in the courts:

> "The judicial system has long been vexed by the problem of congestion and delay in the disposition of civil actions for bodily injury, death or property damages pending in the Trial Courts. Various techniques such as compulsory arbitration, have helped to dispose promptly of the bulk of such cases in amounts under $10,000 in Philadelphia and Allegheny Counties and under $5,000 in other counties which have adopted compulsory arbitration. Nevertheless, there is still a considerable residue of so-called major cases not presently subject to arbitration which require further proceedings in the Trial Court.
>
> Statistics show that only 38 percent of these cases ever go to Trial and only 25 percent ever go to verdict. Thirty-eight percent are settled without going to Trial. Some are settled through Pre-Trial Concilia-

tion techniques, but in too many cases meaningful negotiations commence only after a trial date is fixed or on the courthouse steps or in the courtroom, thus leading to delay in the disposition of cases and congestion in the courts. *The present practice provides no incentive for early settlement.* (Emphasis supplied)

In the usual civil action for bodily injury, death or property damage there is no compensation to the successful plaintiff and no sanction against the defendant for the long delay between commencement of the action and the trial. A survey of procedures in other jurisdictions discloses that a number of states by rule or statue provide for damages for delay in these cases ranging from 6 to 9 percent of the ultimate verdict". (Emphasis supplied)

Rule 238, Explanatory Comment.

. . .

II.

Rule 238 does not violate the Equal Protection Clause of the United States Constitution and does not discriminate between Appellant and Appellee Laudenberger in a classification prohibited by constitutional standards.

It is proper and valid to make classifications under the 14th Amendment provided that classification is:

"Reasonable, not arbitrary, and rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike".

Reed v. Reed, 404 U.S. 71, 76 (1971) quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Appellant proposes that merely because parties are in the same law suit that they are similarly circumstanced and must be treated "equally" so that if "interest" is allowed to Plaintiff it must also be allowed to Defendant. However, Plaintiff and Defendant are not similarly circumstanced for the purpose of Rule 238. Under the Rule Plaintiff may be compensated because he was the victim of a tortious wrong and may also receive damages for "delay" only when the "delay" is brought about by Defendant's failure to make a realistic settlement offer. The Defendant has suffered no harm due to wrong-doing by Plaintiff, and any "delay" does not deprive Defendant of any compensation owed by Plaintiff. Should Plaintiff cause "delay" by refusing a realistic offer of settlement Plaintiff is then not entitled to "delay damages".

Therefore, Rule 238 makes no arbitrary classification between similarly situated persons related to the reasonable object and purpose of Rule 238.

III.

Rule 238 is not violative of the Due Process Clause of the 14th Amendment of the Constitution and does not deprive Appellant of property without affording Appellant an opportunity to avoid the "penalty" of Pre-Judgment interest.

Rule 238 provides for damages for delay, to be computed as "interest". The rule is applicable only in those instances where Defendant does not make a realistic settlement offer in writing. The "delay" sought to be compensated is that which results from the Defendants

failure to reasonably and promptly pay for harm he has caused. The "delay" intended to be cured is not merely that arising from any tactical maneuvers that Defendant may engage in while testing his legalistic jockying.

Appellant complains that the "responsibility" for the "delay" is not distributed equally or at least is not imposed upon the parties in a manner commensurate with each parties responsibility for the delay. An analysis of the application of the Rule bears out the contrary to be true. In the case where there is no liability there is no responsibility upon the Defendant to pay anything and there can be no damages for "delay". Where there is absolute liability the Defendant is urged to settle the case as quickly as possible, preferably even before Suit is filed, and the incentive for his doing so is to save additional funds including the 10% damages for "delay".

In the cases where there exists questionable liability and, perhaps, questionable amount of damages, each party must then make his fair appraisal of his position in the case. If Plaintiff's demand is unreasonable so that the ultimate verdict falls below the sum offered by Defendant, there is no damage for delay. If Defendant's offer is unrealistic to the point that he offered an amount in settlement that is below 80% of the eventual verdict against him, he must then pay the 10% "penalty". In the other group of cases where minds and analysis may fairly differ as to valuation both as to liability and damages, and the Defendant's offer of settlement is within that prescribed range so that the eventual verdict is not 125% of the amount of Defendant's offer, the Defendant pays no penalty. In this latter event, the Plaintiff is penalized by getting no interest because of having made, what is now obviously, an inordinate and/or unreasonable demand.

IV. Pa. R.C.P. 238 furthers a state interest and is not violative of the Due Process and Equal Protection Clause of the United States Constitution and does not impair Appellants right and access to the court in any proper case.

Rule 238 in no way violates the Due Process and Equal Protection Clause of the Constitution. There is no penalty imposed on a Defendant for merely bringing a case to Trial and insisting upon the case being tried. However, if the Defendant unreasonably insists upon bringing the case to Trial and unreasonably insists upon being heard, ("reasonableness" being determined best in retrospect and in light of a jury or Court Award), then the Defendant must pay the penalty for, perhaps, arbitrarily seeking to test that right to be heard. It is of important state interest to keep the Courts clear for those cases in which there are honest and legitimate issues of fact and law. It is a legitimate state interest to clear the Courts of those cases that should reasonably be settled.

All parties to a Lawsuit are subjected to possible penalties under Rule 238. Plaintiff is penalized by not being entitled to the damages for delay if his demand is finally determined to have been excessive and/or unrealistic. Defendants are penalized if their fair appraisal of their own situation in the litigation does not prompt them to honestly make a realistic offer of settlement based upon their exposure in the situation. Rule 238 in no way violates the Equal Protection Clause of the Constitution.

Rule 238 as applied in the instant case in no way violates Appellant's due process rights. There does not seem to be anything fundamentally unfair in a jury finding Appellant and appellee PAT 40% and 60% liable

respectively and therefore have delay damages assessed against them in accordance with that proportion. It should be noted that neither Appellant nor PAT Appellee sought to avail himself of the protection that Rule 238 provided for him. Neither Appellant nor PAT Appellee made any offer of settlement in the within case. The question as to which Defendant caused the "delay" was and is completely irrelevant in the instant case. Since neither Defendant made any offer of compromise, it must be concluded that both Defendants were responsible for the delay. The fact that the jury found one Defendant more responsible for the accident than the other Defendant is of no moment.

Rule 238 does not violate the Due Process Clause of the 14th Amendment on the basis that the Defendant is deprived of property without due process of law. The legal process by which Defendant may protect himself from being obliged to pay the 10% damages for delay is built into the rule itself. Defendant need merely appraise his situation and make an offer he believes to be appropriate under the circumstances. If honestly and appropriately made, the "penalty" does not follow. To suggest that the Rule should also provide some kind of "post-mortem" inquiry as so as to determine exactly how much and in what manner which Defendant caused the "delay" would involve another process which is certainly unwanted and unneeded in the present court system. Again, Appellant seeks to put too limited a definition on the term "delay".

Rule 238 mandating "damages for delay" against Defendants "only" does not contravene any rights guaranteed by the 14th Amendment. In no event and in no instance is the penalty provided by Rule 238 imposed upon Defendant's right to be heard and to present his

case in court. It is only in those instances where the right of the Plaintiff to compensation is balanced against the Defendant's right to be heard as to his non-liability, that, an error on the part of either of both parties will trigger the effect of Rule 238, and what could be more fair than that?

CONCLUSION

Rule 238 is constitutional under all the standards of the Equal Protection Clause and Due Process clause of the Constitution of the United States. The judgement of the Supreme Court of Pennsylvania upholding Rule 238 as constitutional should be affirmed and should not be disturbed or inquired into by the Supreme Court of the United States.

The Supreme Court of the United States should not grant review on the question of the constitutionality of Pennsylvania Rule of Civil Procedure 238 and should dismiss the application of Appellant.

Respectfully Submitted,

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Appendix

APPENDIX A

Pennsylvania Rules of Civil Procedure

Rule 238. Award of Damages for Delay in an Action for Bodily Injury, Death or Property Damage

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators appointed under the Arbitration Act of June 16, 1830, P.L. 715, as amended, 5 P.S. § 30 et seq., or the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, 40 P.S. § 1301.101 et seq., shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict or decision;

(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision.

(b) In arbitration under the Act of 1836, the amount of damages for delay shall not be included in determing whether the amount in controversy is within the jurisdiction of the arbitrators.

(c) Except as provided in subdivision (e), damages for delay shall be added to the award, verdict or decision against all defendants found liable, no matter when joined in the action.

(d) The court may, and on request of a party shall, charge the jury that if it finds for the plaintiff, it shall not award the plaintiff any damages for delay because this is a matter for the court.

(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made.

Note of the Procedural Rules Committee: In additional defendant proceedings, the additional defendant will be considered the "defendant", for purposes of this subdivision, and the "plaintiff" will be either the original defendant if liability over is claimed, or the original plaintiff if direct liability is claimed, or both if both forms of liability are claimed.

(f) If an action is pending on the effective date of this rule, or if an action is brought after the effective date on a cause of action which accrued prior to the effective date, damages for delay shall be computed from the date plaintiff files the initial complaint or from a date one year after the accrual of the cause of action, or from a date six (6) months after the effective date of this rule, whichever date is later.

(g) This rule shall not apply to

(1) eminent domain proceedings:

Note of the Procedural Rules Committee: See Article VI, Sec. 611 of the Eminent Domain Code of 1964, Special Session, June 23, P.L. 84, 26 P.S. § 1-611, governing compensation for delay in payment.

(2) pending actions in which damages for delay are allowable in the absence of this rule.

Note of the Procedural Rules Committee: See Marrazzo v. Scranton Nehi Bottling Co., Inc., 438 Pa. 72, 263 A.2d 336 (1970), for instances in which compensation for delay may be allowed in trespass actions for destruction or involuntary conversion of property where the compensation can be measured by market value or other definite standards.

History: New Rule 238 was promulgated November 20, 1978, Effective April 15, 1979.

Motion to Dismiss or Affirm

Supreme Court, U.S.
FILED
APR 5 1982
L. STEVAS
CLERK

No. 81-1426

In the Supreme Court of the United States

October Term, 1981

FREDERICK E. BUCHEIT,
Appellant

v.

REXFORD LAUDENBERGER,
Appellee

and

PORT AUTHORITY OF ALLEGHENY COUNTY and ARTHUR R. CARTER,
Appellees

OFFICE OF ATTORNEY GENERAL, COMMONWEALTH OF PENNSYLVANIA
Amicus Curiae

On Appeal From the Supreme Court of Commonwealth of Pennsylvania

MOTION TO AFFIRM

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MOTION TO AFFIRM

The Office of Attorney General, Commonwealth of Pennsylvania adopts those portions of the Jurisdictional Statement filed on behalf of Frederick E. Bucheit, Appellant, requesting the granting of review of the Appeal on its behalf and the contention that Rule 238 of the Pennsylvania Rules of Civil Procedure is unconstitutional. The opinion of the Trial Court, the opinion of the Supreme Court of Pennsylvania, and Rule 238 have been reproduced in Appellant's Jurisdictional Statement. This Office does not adopt all the reasoning of Appellant; however, it is the opinion of this Office that Rule 238 is unconstitutional as applied to all Defendants.

On November 20, 1978, over dissent, the Supreme Court of Pennsylvania had sufficient members to promulgate Rule 238. On October 29, 1981, over dissent, the Supreme Court of Pennsylvania had sufficient members to find Rule 238 constitutional overruling and reversing the Trial Court's opinion that Rule 238 was unconstitutional.

Concisely, Rule 238 mandates without discretion a 10% per annum addition to damages awarded a plaintiff in a tort action when defendant has failed to make an offer prior to trial within 125% of the verdict or award. The Rule has been captioned "Award Damages for Delay in an Action for Bodily Injury, Death or Property Damage." The Supreme Court of Pennsylvania has defined this Rule as procedural; the Jurisdictional Statement of Appellant has described the Rule as substantive; regardless of either designation, it is the opinion of this Office that Rule 238 is

a taking of property without due process of law and a violation of constitutionally protected property and contract rights.

The Pennsylvania Supreme Court promulgated Rule 238 and as the highest Court in the Commonwealth, reviewed and sustained its prior determination. Without review by the highest court in the land, a decision, correct or incorrect, may be permitted to remain a law confirmed through a system which is offensive to government by separation of powers and checks and balances.

Adopted in the name of court efficiency and to effectuate prompt, expeditious trial and settlement of cases, Rule 238 gives equal incentive to plaintiff to delay trial and collect additional non-taxable damages. Intensive supervision and administration of the judicial system coupled with dedication to the place of honor as a member of the Judiciary would provide the citizen with a "speedy trial" without the necessity of a penalty. The Rule defies the logic of its creator and denies relief in its application whether the fault of the delay be the plaintiff or the Court.

The mandatory application of damages regardless of the cause or perpetrator of the delay is unconscionable. So many questions are left unanswered. If a premium has been collected and a contract entered between an insurer and an insured to cover specific losses in specific amounts against whom may the delay damages be assessed? If a verdict is in excess of the insurance coverage, is the insurer or the insured responsible for delay damages? How does one recover delay damages from a judgment-proof defendant? Why should one claimant recover delay damages from an entity like the Commonwealth when another claimant goes unpaid? In a comparative negligence case, are the

delay damages assessed against each defendant in proportion to his amount of comparative negligence? If a verdict is returned in favor of a defendant and is then reversed on some technicality and upon retrial a verdict is entered against the defendant, is it proper to assess delay damages as set forth in Rule 238? Legitimate assessment of interest may be justifiable, but a penalty in the name of delay without discretion and consideration is unjustifiable.

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of the Commonwealth of Pennsylvania finding Rule 238 constitutional should be reversed. The Rule is a violation of the constitutional rights protected by the 14th Amendment of the United States Constitution. In the alternative, the appeal should be granted plenary review because of the substantial federal questions.

Respectfully submitted,

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